93-129

Supreme Court, U.S.
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No._____.

In The

Supreme Court Of The United States

OCTOBER TERM, 1993

CHARLOTTE A. HAMANN
Petitioner,
v.
RICHARD S. THRELKEL
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT

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In Pro Se

QUESTIONS PRESENTED

1. May the California courts arbitrarily conclude that a contract does not exist without reference to the statutes which define its existence and without concluding the nonexistence of any essential element of contract as defined by statute, or is such State action an arbitrary denial of equal protection of state property and contract laws and prohibited by the Fourteenth Amendment?

2. May the California Court of Appeal conclude the nonexistence of a contract using a procedural rule and without reference to the substantive law which defines the contract, or is such state action a redefinition of property using the procedures for its deprivation, which is contrary to the holding of this Court, and an arbitrary nullification of property which is prohibited by the Equal Protection Clause of the Fourteenth Amendment?

3. If Cal. Code of Civ. Proc. § 632 makes the time length of the trial a condition for requiring that the trial court "shall" explain the factual and legal reasons for its decision in writing, but the court reporter either mistakenly records the time or neglects to record the time, may the state preclude a party from asserting the statutory right to a written "statement of decision" by simply declaring that the time record is too uncertain to fulfill the statutory condition, or does the uncertainty of the condition fail the constitutional mandate of the Equal Protection Clause of the Fourteenth Amendment?

4. Does Cal. Code of Civ. Proc. § 632 which provides that the trial court may state the reasons for its decision orally on the record for trials lasting less than 8 hours, meet the minimum requirements of the Due Process Clause of the Fourteenth Amendment?

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OPINIONS OF THE COURTS BELOW

The Opinion (Opn.) of the California Court of Appeal is printed in the appendix to this petition at App. 17. [1] The order denying the petition for rehearing with modification of opinion but no change in judgment is printed at App. 26.

The oral "statement of decision" of the Contra Costa County, California, Superior Court, is printed at App. 28.

The appellate court affirmed the judgment the of the trial court, which was in favor of the respondent and cross-defendant.

JURISDICTION

The jurisdiction of this Court is invoked under Rules of the Supreme Court of the United States, Rule 10(c), and 28 U.S.C. § 1257(a). The California Supreme Court's order denying discretionary review was filed on April 21, 1993.

28 U.S.C. § 2403(b) may be applicable. The California Attorney General will be served.

CONSTITUTIONAL PROVISIONS AND STATUTORY LAW

U.S. Const., Fourteenth Amendment, Section One

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

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1 The abbreviation "App." refers to the appendix, which follows this document.

Cal. Civ. Code § 1549

"A contract is an agreement to do or not do a certain thing."

Cal. Civ. Code § 1550

"It is essential to the existence of a contract that there be:
1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and,
4. Sufficient cause or consideration."

Cal. Code of Civ. Proc. § 632

"In superior, municipal, and justice courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested such a statement, any party may make proposals as to the content of the statement of decision.

The statement of decision shall be in writing unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties."

WHEN FEDERAL QUESTION RAISED

The repeated, arbitrary denial of equal protection of California contract and property laws, first by the trial court and then by the appellate court, was raised as a federal claim in the Petition for Review to the California Supreme Court, 12-14. App. 26. The lower courts' actions were specifically identified as a violation of the Equal Protection Clause of the Fourteenth Amendment.

The failure and refusal of the trial court to provide a written "statement of decision" as required by Cal. Code of Civ. Proc. § 632 was not specifically labeled a Fourteenth Amendment "due process" or "equal protection" issue in any of the briefs. It was identified as "a substantial right, as inviolate, under the statute, as that of trial by jury under the constitution." Appellant's Opening Brief at 15-16 citing California case law.

The argument for bringing the constitutionality of Cal. Code of Civ. Proc. § 632 under this Court's jurisdiction is first that the state courts have been fairly and fully apprised of this issue with the same facts and argument as would support a Fourteenth Amendment deprivation without due process cause of action in federal or state court. The petitioner has argued this cause in every brief.[2]

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2 Appellant's Opening Brief at 16: "The trial court's refusal to prepare a written statement of decision seriously prejudiced the appellant. She had nothing concrete on which to base a motion for reopening the trial, making a motion for a new trial, or preparing for appeal."

Appellant's Reply Brief at 5-6: "The real problem is that the oral statement of decision and later remarks made by the trial court are contradictory, inconsistent and confusing. Hamann's attempts to bring this to the court's attention have been documented and argued in the appellant's opening brief. It can hardly be said that the court was "lulled" into believing there was no problem. [Citation.] . . . The right to a carefully reasoned statement of decision is a substantial right. [Citation.]"

Petition for Review at 23: "The Opinion underscores the importance of a carefully considered statement of decision, whether it is

The irrationality of conditioning a litigant's right to a written statement of decision on the happening of an event which the litigant cannot control, the recording of trial time, was put directly to the California Supreme Court in the Petition for Review at 18. The issue has been "pressed" below. *Bankers Life & Casualty Co. v. Crenshaw* 486 U.S. 71, 79, 100 L.Ed.2d 62, 72 (1988).

Secondly, this denial of due process and equal protection is obviously capable of repetition but may indefinitely evade the Court's review for reasons of mootness, the mere passage of time, the cost of appeal, or ripeness. *Vitek v. Jones* 445 U.S. 480, 503 (1980) 63 L.Ed.2d 552. (Blackmun, J., dissenting opinion.) An additional consequence of an unexplained or poorly explained trial court decision is an inadequate or undeveloped record which reviewing courts are loath to scrutinize. This denial of due process and equal protection masks itself.

Finally, it would have been far more difficult for the state courts to arbitrarily deny the petitioner equal protection of the laws if they had complied with the intendments of Code of Civ. Proc. § 632. The irony of state courts weaseling out of the due process requirements of state laws which purpose it is to assure due process of law and equal protection of the laws should not be lost on this Court.

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oral or written. A statement of decision not only protects the litigant's rights in trial court, it makes the case easily reviewable on appeal [Citations.] . . . Hamann objected strongly in her Petition for Rehearing that the Court of Appeal had completely missed the point, and she continues her objection here. The petitioner maintains the Court of Appeal should not be allowed to escape its obligation to determine the main cause by impliedly determining the main cause adversely to the appellant. The petitioner has twice been denied her substantial right to reason (Cal. Const., art. VI, § 14; Code of Civ. Proc. § 632.) The decision of a reviewing court should express some understanding of the essential legal issue at issue and must decide the main cause."

STATEMENT OF THE CASE

The action began as a contract law case. In 1982 the petitioner and respondent signed a written real property agreement which provided that all contributions to the real property which they coowned had to be identical and equal.

At the time the parties signed this agreement they discussed the construction labor they intended to do on the property and orally affirmed their commitment to equal construction labor as well as to equal cash outlays. Both parties testified that they knew the petitioner would do more work initially, but it was their intention that respondent's work equal petitioner's work over the life time of their contract. The evidence of this collateral oral "equal labor" agreement is unconflicting and consistent.

Petitioner invested more than 7000 hours of her construction labor in the property over a period of seven and one-half years, and contends that she did 90% of the work based on hours or the reasonable value of her labor. Petitioner's labor and services were judged to be of professional quality by licensed electrical, plumbing, masonry and general construction contractors. The reasonable value of her labor and services is between $60,000 and $80,000. In other words, she invested at least $60,000 more in the property than the respondent did.

Petitioner testified that when it became apparent that respondent was never going to do an equal amount of work, he promised petitioner that he would pay her for her work when the work was completed. Respondent denied this subsequent, oral "cash for labor" agreement. The evidence of the subsequent cash for labor agreement was conflicting and therefore was not at issue on appeal. Petitioner argued on appeal that since the subsequent cash for labor agreement was disputed and not proven, the equal labor agreement remained in effect.

In 1989, as the work on the property neared completion, respondent filed an action for specific performance on the

contract or in the alternative partition of the real property. He refused to compensate petitioner for her labor. Petitioner counter claimed for joint venture dissolution and accounting, declaratory relief on the parties' agreement, and quantum meruit recovery for construction labor and services.

The trial was bifurcated by stipulation. The parties were barred from introducing any evidence of how much total work they had each done. During the first half of the trial the court was supposed to define the terms of the parties' written and oral agreements.

THE TRIAL COURT FINDINGS

The trial court initially found, on January 31, 1991, that there was a contract for labor. The trial court's oral "statement of decision," including later remarks, is reprinted at App. 28-63. The equal labor contract testimony of both parties can be found at App. 64. From the statement of decision:

> THE COURT: "Labor was always assumed would be something that they were going to share in the actual building of these additions." R.T.(A) 227 [3]; App. 30.
>
> THE COURT: "The spirit of the contract was, I'm doing an hour, you should do an hour, regardless of what that work is." R.T.(A) 227; App. 30.
>
> THE COURT: "I think the agreement is, Was an hour, is an hour, unless the parties could really go through: I worked "X" number of hours, he or she worked "Y" number of hours, and the difference is "Z," we're then going to attribute some value of "Z." Unless the parties could do that, I don't think that quantum meruit should

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3. "R.T.(A)" refers to the first volume of the court reporter's trial transcript.

apply." R.T.(A) 231; App. 32.

THE COURT: "There were complaints about labor. There were complaints that Ms. Hamann said, I think I'm doing more work than you, Richard, and it's time to do something about this.

Richard's comments back was always, but we aren't finished yet, let's see we get finished.

I don't know that's necessarily a putting-off-type situation as much as it is saying, We're only halfway through the project. You don't know how many hours I'm going to put in, you don't know how many hours you're going to have to put in. You just don't know." R.T.(A) 228; App. 30.

The respondent's trial brief stated:

"At deposition, both parties contended that it was their mutual intent to share equally the labor involved in the repair and renovation of their home." C.T. 87 [4].

The trial had been bifurcated by stipulation and in the first half of the trial the petitioner was barred from introducing any evidence of how much work she had done. Despite having heard essentially no evidence of how much work had been done by each of the parties, the trial court further concluded that the petitioner couldn't prove that she had done more than 90 percent of the construction work, so she wouldn't be given the chance to try.

THE COURT: "And my sense from the testimony of both is that the parties really can't do that. You can't really go back now two, three, four years and try and remember

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4 "C.T." refers to the clerk's transcript which contains the pleadings and other filings.

how much time you took to break out a foundation, or how much time it took to clean up a place." R.T.(A) 231; App. 32.

The petitioner returned to court one week later, on February 7, 1991, with an initial offer of proof of her ability to show that she had done the work, witnesses. People who lived in the neighborhood where the petitioner had done her construction work wrote statements attesting to the relative amount of time each of the contracting parties had been seen doing construction work on the property.

"MR. MOLL: Well, your Honor, I would like to reopen on the issue of the labor because I feel that the ruling that was indicated by the Court was, in fact, that there was a contract. And it did deal with labor, although you indicated it would be more in the area, you felt, the labor was more into the area of hours rather than the value of the work. . . . And I feel that we can show that there was a breach of the contract as found by the Court, but because of the nature of our understanding, this testimony was never offered or proof offered. And today in the courtroom are numerous of the neighbors that lived in the neighborhood that observed the work going on that can testify to, you know, in large part to the huge discrepancy between the amount of labor that went on between the parties."

. . .

THE COURT: My concern, Counsel, and I don't mean to cut you off, but I don't see where that makes a bit of difference because the original contract didn't really contemplate labor as being an area that was going to be involved.

. . .

MR. MOLL: Well, then perhaps I misinterpreted your ruling because I was under the impression that you said in fact it was contemplated.

. . .

> THE COURT: There was never an agreement regarding labor." R.T.(A) 241-243; App. 40-42.

The court had heard no new evidence since trial. This reversal is one of several inexplicable reversals and many contradictions in the findings.

The court refused to allow the witnesses to testify or to include their statements in the record. R.T.(A) 258; App. 53.

The court further concluded that it was unfair for the petitioner to prove that she had done the work:

> THE COURT: "I don't think that at this point in time it would be fair, and I'm just talking about the innate fairness at this 11th hour now, that these people have split up one of them says, This is unfair, I did a whole bunch of work in this place, and I know how much work I've done in this place, and I want to be able to put evidence in about how much work I did on this place." R.T.(A) 244; App. 42.

Two weeks later the petitioner sent a letter to the trial judge and included with her letter the witnesses' handwritten statements which she had attempted to introduce in court. The judge did not respond. Two months later, she wrote a second letter to the judge asking him if he had ruled on quantum meruit. She had taken the trial transcript to several lawyers, other than her trial lawyer, and not one could legally or equitably explain the oral statement of decision. The judge responded with a letter to her trial lawyer.

The witnesses statements and the letters immediately follow this petition. App. 1-16. See also App. 97-104.

The trial court did not provide a written statement of decision. Cal. Code of Proc. § 632 conditions the duty of the trial court to provide a written statement of decision on the time length of the trial.

The court reporter in this case failed to adequately

document the time record of the trial, Since the trial was spread over three days, the total trial time is uncertain.

On July 22, 1991, the petitioner filed her notice of appeal. Petitioner appealed on two main issues: the existence and enforcement of the equal labor agreement and the failure of the trial court to issue a written statement of decision as required by Cal. Code of Civ. Proc. § 632.

THE APPELLATE COURT OPINION

The California Court of Appeal remarked favorably on the competency of the petitioner's appellate briefs—

> "Appearing in propria persona, she has submitted a remarkably competent brief, displaying (one may imagine) the capacity to learn an unfamiliar discipline that she demonstrated in restoring and remodeling the house." Opn. 9; App. 24.

But the appellate court's opinion fails to engage any of the petitioner's legal argument, and it never acknowledges that the main issue before the court is the equal labor agreement.

The court characterizes the evidence as "conflicting" but cites no examples of conflicting evidence.

The Opinion rests on the following evidence: the court first cites the respondent's testimony that the parties specifically rejected a labor agreement which appears on page 143 of a legal self help book which the parties used to draft their agreement. Opn. 9-10, App. 23-24. The petitioner's testimony confirms that the parties rejected this "labor for real property ownership" agreement appearing on page 143.[5] The consideration for the parties' "equal labor" agreement was labor, not real property. The parties'

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5 The terms of the rejected agreement can be found at App. 84-87

testimony can be found at R.T.(A) 15-16, 99-100; R.T.(A) 174-175; App. 66-68.

Secondly, the court cites the respondent's testimony that the phrase "cost of repairs and improvements" in clause 3 of their written agreement referred to "out-of pocket" expenses only, and did not include cash compensation for labor. Opn. 9-10, App. 23-24; R.T.(A) 192, App. 68-69. Respondent also testified that a "cash for labor" agreement was left out of clause 3 because the parties decided that their labor would be equal. R.T.(A) 198, App. 70-71. On appeal the petitioner argued that the "equal labor" agreement was a collateral oral agreement, consistent with the parties' written agreement, or included in clause 3 by inference. App. 92.

Nothing the court opines negates the following testimony: Cross examination of respondent:

"Q. Did you discuss who's going to be doing the work?
A. In general terms, yes.

. . .

Q. Did you feel that you were going to work on it together and basically split the work down the middle?
A. Over time, yes.

. . .

But what we realized is that in the immediate terms Charlotte would probably do more than me. And that over time we'd equalize that out.
Q Okay. But the intention then was that over time things be equaled out; is that correct?
A. Yes." R.T.(A) 38-39; App. 64-65.

Cross examination of respondent:

QUESTION: All right. Well, let's talk about that. Did you discuss that at the time that you wrote - - did you discuss that at the time you wrote paragraph 3?
ANSWER: I think so.
[QUESTION:] Can you remember those discussions?
ANSWER: They were basically that we work on the house together.
QUESTION: Okay. That was the intention that you

would work on the house together equally?
ANSWER: Yeah, there would be give and take by both.
[QUESTION:] Relatively equally?
ANSWER: Yeah.
QUESTION: Relatively equally?
ANSWER: Yeah.' " R.T.(A) 196-197; App. 69-70.

Cross examination of respondent:

"Q. Okay. My question to you is, Is it not a fact that you really didn't discuss the compensating one another for an unequal amount of labor at the time you wrote this agreement?
A. Okay. Now, in making my answer I will presume that you're - -you're asking me this question because of my answer where I said that wasn't a consideration of how things were split in paragraph 3.
Q. That's correct.
A. What I meant by that wasn't a consideration in terms of paragraph 3. Was that that paragraph - - let me say this carefully, I think the answer to that is in the next few questions and answers where I said, "Well, it's left out probably on purpose." It was discussed and we had decided that we would be splitting the labor relatively equally so there would be no labor in the way we figured, you know, if - - if we were going to pay one another for labor." R.T.(A) 198: 1-18; App. 70-71.

Deposition of respondent:

"Q. Well, were you willing to undertake the work all on your own and have Charlotte do a little bit of it?
A. No.
Q. And would you have wanted her to take on all of the work and you just do a little bit of it?
A. No.
Q. Would you say your general understanding was that the amount of work you would do would be relatively equal?
A. Over time, yes.
Q. Did you discuss that?

A. Yes.

. . . .

Q. Okay, when were these discussions taking place?
A. They went on all the time." Respondent 's Deposition (Vol I) 26-27: 6-7; App. 64.

The appellate court affirmed the judgment of the trial court, concluding that there was no labor contract, and did not reverse for a written statement of decision. The petitioner's request for rehearing was denied on February 25, 1993. The California Supreme Court denied her petition for review on April 21, 1993.

REASONS FOR GRANTING THE WRIT

I

The California Courts' Arbitrary and Capricious Denial of Equal Protection of State Contract and Property Laws Violates the Fourteenth Amendment and Results in a Deprivation of the Fundamental Right to Acquire, Possess and Enjoy Property.

The right to make contracts is an empty right if the contract is not recognized by the State. The right to acquire, possess and enjoy property is an empty right if the existence of that property can be arbitrarily and unjustly nullified by the State.

The trial court transmuted the legal question of whether the equal labor contract exists into a subjective question of whether the contract should exist. The trial court did not conclude the existence or nonexistence of any essential element of contract as defined by statute. The record shows the trial court reaching for a result and that result is that a woman will not be compensated for her construction labor, no matter what.

The appellate court also ignored the substantive law which defines the property right of contract, and hinged the

existence of the contract on an appellate procedural rule. This ignores the substantive nature of property and is contrary to this court's holding that property cannot be defined by the procedures used for its deprivation. *Cleveland Board of Education v. Loudermill* 470 U.S. 532, 541, 84 L.Ed.2d 494,503 (1985).

The state courts' decisions are not "merely erroneous." They are intentionally arbitrary. *American Ry. Express v. Kentucky* 273 U.S. 261, 269, 71 L.Ed. 636 (1927). It is the California courts' lawless conclusion that the equal labor contract does not exist which has raised the federal claim. *Kies v. Lowrey* 199 U.S. 233, 239, 50 L.Ed. 167 (1905) (It is the "power and duty of this court to determine the existence or non-existence of a contract" where a Fourteenth Amendment claim has been raised.)

This State action has deprived the petitioner of more than property. The state courts have redefined the petitioner's right to contract so that it is so nebulous, arbitrary, and unpredictable as to be unattainable. Her property interest has been disembodied from the statutes which define it. How can she bargain for her labor if the courts refuse to recognize or enforce the bargain?

1. The arbitrary conclusion that a contract does not exist without reference to the statutes which define the existence of a contract, and without also concluding the nonexistence of any essential element of contract, is a denial of equal protection of the laws.

Under California law, a contractual right is a form of property. *In re Marriage of Brown* 15 Cal.3d 838, 845; 126 Cal.Rptr. 633 (1976). The consideration for the equal labor agreement, labor, is also property. *Board of Regents v. Roth* 408 U.S. 564, 571-572, 33 L.Ed.2d 548, 557-558 (1972).

Cal. Civ. Code § 1549 defines a contract as an agreement to do or not do a certain thing. Cal. Civ. Code

§ 1550 defines the elements essential to the existence of a contract: parties capable of contracting, their consent, a lawful object, and a sufficient cause or consideration. The adoption of these statutes in 1872, as part of the original state civil code, preceded the adoption of the California constitution in 1879. The definitions are routinely invoked in both jury and nonjury trials,[6] and are ubiquitous in American law.

These statutes are not evidentiary rules. The essential elements of contract are not the equivalent of prima facie evidence which creates a presumption of contract. The essential elements of contract may not be discarded as the evidentiary burden shifts and narrows. They are substantive rules of law; they define the property interest. If these essential elements of contract exist, the court must conclude that a contract exists.[7]

The conclusion that a contract does not exist, that it is a nullity, is very different than concluding that it is unenforceable, or void. All are legal conclusions.[8]

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6 "A. NATURE OF CONTRACT. BAJI 10.55 (1990 New). CONTRACT DEFINED/ELEMENTS.

A contract is an agreement between two or more persons to do or not to do a certain thing or things.

A [valid] contract requires:

1. Parties having legal capacity to contract,
2. Mutual consent,
3. A lawful objective, and
4. A sufficient consideration."

California Jury Instructions Civil [BAJI] January, 1993, Pocket Part for Seventh Edition, Vol. 1, p. 247.

7. Cal. Civ. Code § 1550 does not create a presumption of contract--conclusive, rebuttable, or otherwise. Compare *Michael H. v. Gerald D.* 491 U.S. 110, 105 L.Ed.2d 91 (1989) and *St. Mary's Honor Center v. Hicks* 93 C.D.O.S. 4747, 93 D.A.R. 8057 (1993).

8. A contract may be found unenforceable, for example, due to the statute of frauds, the statute of limitations, unperformed conditions, or lack of remedy at law. Or a contract may be voidable for reasons of fraud

The California trial court first concluded a contract for equal labor existed, then arbitrarily, and without the introduction of any new evidence or argument, concluded that a contract for labor did not exist. The trial court drew these conclusions without ever concluding the proof or disproof of any of the essential ultimate facts: the existence or nonexistence of the essential elements of contract. These are lawless conclusions, not a legal conclusions.

The appellate opinion begins with the incorrect premise that the existence of a contract is a finding of "ultimate fact." Opn. 7; App. 22. This isn't just an unfortunate use of words. This court never gets to Cal. Civ. Code § 1550. It never looks for the essential elements of contract. It never gets to the substantive law which defines the property interest.

2. The nullification of a property interest using a procedural rule is prohibited by this Court's conclusion that property cannot be defined by the procedures for its deprivation any more than can life or liberty.

In *Cleveland Board of Education v. Loudermill* 470 U.S. 532, 84 L.Ed.2d 494 (1985) this Court held that the right to due process " is conferred not by legislative grace, but by constitutional guarantee." [9] The key to this holding was the following conclusion:

> "The categories of substance and procedure are distinct. . . . "Property" cannot be defined by the procedures for its deprivation any more than can life or liberty." Id. at 541.

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in the inducement, mistake, duress or illegality. An unenforceable or voidable contract still exists, may have legal consequences, and may be a property interest. A contract which does not exist has no legal consequence and is not a property interest. 1 Williston, A Treatise on the Law of Contracts (4ed 1990) §§ 1:20-21.

9. Powell, J., concurring opinion in *Arnett v. Kennedy* 416 U.S. 134, 167, 40 L Ed.2d 15 (1974)

The facts of this case show the wisdom of this Court's conclusion and, by inference, its prohibition against the nullification of a property interest using a procedural rule.

The Due Process and Equal Protection Clauses converge on this prohibition.

The appellate court decision that the equal labor contract does not exist rests on the California standard of review that if there is conflicting evidence in the record, any reasonable construction of a contract by the trial court will be upheld. Opn. 10; App. 24-25. The Opinion cites two examples of evidence which the court claims brings this procedural rule into play. There is no need to argue whether the evidence the appellate court has set forth is conflicting.

Evidence "one" shows that the parties rejected a labor agreement appearing on page 143 of THE LIVING TOGETHER KIT, a legal self help book the parties used to draft their agreement. Opn. 9-10; App. 24. The terms of the rejected agreement can be found at App. 84-87. The parties rejection of this "real property ownership for labor" agreement says nothing about the existence or nonexistence of the "equal labor" agreement. The cited evidence is irrelevant.

Evidence "two" shows that the respondent does not believe that clause 3 of the parties' written property agreement includes cash compensation for the parties' labor. A conclusion that a "cash for labor" agreement is not included in clause 3 says nothing about the existence or nonexistence of the "equal labor" agreement as a collateral oral agreement. The cited evidence is irrelevant.

The appellate court has made the nonexistence of a contract dependent upon the existence of "conflicting" evidence, any "conflicting" evidence, relevant or irrelevant to the proof of the essential elements of contract.

"It is essential that there be some rational connection between the fact proved and the ultimate fact found, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

McFarland v. American Sugar Co. 241 U.S. 79, 86, 60 L.Ed. 899 (1916). This admonition, the substantial evidence rule, is lost on this reviewing court because, like the trial court, it never gets to Cal.Code of Civ. Proc. § 1550. The court has given a procedural rule precedence over rules of substantive law.

The Opinion cites *Quader-Kino A. G. v. Nebenzal* 35 Cal.2d 287, 217 P.2d 650 (1950) as authority for this. It is certainly true that the California Supreme Court made the same mistake 40 years ago. The Petition for Rehearing relied on California Chief Justice Traynor's strong dissent in that case. Chief Justice Traynor's dissent eventually translated into the unanimous opinion, *Parsons v. Bristol Development Co.* 62 Cal.2d 861, 44 Cal.Rptr. 767 (1965). *Parsons v. Bristol Development Co.* held that the reviewing court has a duty to de novo review unconflicting evidence in contract law cases.

However, de novo review is meaningless if the reviewing court does not recognize that proof of a property interest must hinge on the substantive law which defines the property right. The trial court ignored Cal. Civ. Code § 1550. The appellate court has disembodied the proof of contract from the statute with a procedural rule.[10] In this state court the proof of contract depends on the existence of "conflciting" evidence, relevant or irrelevant. This is the essence of arbitrary state action and it violates the Equal Protection clause of the Fourteenth Amendment.

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10 The State may terminate a legal claim for failure to comply with a reasonable procedural rule or evidentiary rule, *Hammond Packing Co. v. Arkansas* 212 U.S. 322, 351, 53 L.Ed. 530 (1909) or may limit the legal obligation of a claim by creating substantive defenses to that claim, *Martinez v. California* 444 U.S. 277, 282, 62 L.Ed.2d 481 (1980).

II

The California Court of Appeal Has Interpreted Cal. Code of Civ. Proc. § 632 such that it Violates the Equal Protection Clause of the Fourteenth Amendment. An Oral Statement of Decision Does not Meet the Minimum Requirements of the Due Process Clause of the Fourteenth Amendment.

Whether a litigant is able to assert the right to an explanation for a trial court's decision in California, and whether that explanation is oral or written, turns on the total trial time.

> "The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to submission of the matter for decision." Cal. Code of Civ. Proc. § 632 (Underlining added.)

> "The statement of decision shall be in writing unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties." Cal. Code of Civ. Proc. § 632 (Underlining added.)

As required by the statute, respondent's counsel asked for a statement of decision prior to submission for decision and as required by statute, petitioner's counsel asked for a statement of decision after the court's decision and within 10 days of it.

1. It is unreasonable to condition the right to a statement of decision on an event which the litigant cannot control.

The California Court of Appeal has concluded that because "the record regarding the length of the trial is subject to conflicting interpretations" the record does not affirmatively show error and therefore the petitioner is not entitled to a written statement of decision. Opn. 8-9; App. 23.

The court has drawn an arbitrary line between those litigants who are lucky enough to have a fastidious court reporter present at trial and those who are not.

Moreover, a litigant's need for a written statement of decision is inversely related to the skill and fasitdiousness of the court reporter.

The petitioner estimated the trial time in 4 different ways, in three different briefs, and arrived at estimates of 8.7 hours, 8.5 hours, 8.35 hours and 8.25 hours. The court of appeal accepted none of these estimates, nor was the court willing to do its own estimating.

"The Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out.' [citations] and that rationality is missing here." *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 442, 71 L.Ed.2d 265 (1982) (Blackmun, J., separate opinion, Brennan, J., Marshall, J., O'Connor, J., joining.)

2. An oral statement of decision is inadequate for a trial of this complexity. The need for written reasons is unrelated to the total trial time.

The trial court's statement of decision is contradictory and inconsistent. The appellate court has concluded that the trial court's oral conclusions of fact and law are adequate for affirming the judgment. They are, however, completely inadequate for purposes of challenging the judgment. Where in this oral statement of decision does the trial court identify

the ultimate facts necessary to determine the existence of a contract?

Moreover, when an attempt was made to reopen the trial for purposes of proof of damages of breach of the equal labor agreement, the trial court denied ever finding the existence of an equal labor agreement. Well, the record shows remarks quite to the contrary.

Petitioner's counsel requested a [written] statement of decision following this unsuccessful attempt to reopen the trial. The trial court remarked that the decision was on the record and did not prepare a written statement of decision. R.T.(A) 259, App. 53.

It took 2 months to get the trial transcript. The petitioner took the record to several attorneys, other than her trial attorney. The oral record was so inconsistent, contradictory, and half-baked that none of these lawyers could figure it out. So, the petitioner wrote another letter to the trial judge asking him if he had ruled on quantum meruit. App. 14.

It is unreasonable to block scrutiny of the trial court's decision for several months while the reporter's transcript is prepared. Deadlines for challenging the decision come and go and enforcement of the judgment does not wait for preparation of the reporter's transcript. The Due Process Clause guarantees the right to hearing at a meaningful time and in a manner appropriate to the nature of the case. *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 428, 71 L.Ed.2d 265 (1982).

An appeal after the judgment is final, and after deprivation has occurred, does not substitute for post trial motions. *Connecticut v. Doehr* 501 U.S. —, 115 L.Ed.2d. 1, 16 (1991.) A motion to vacate the judgment on the grounds that it is not supported by the facts, has no counterpart on appeal.[11]

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11. Cal. Code of Civ. Proc. § 663: A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same

For more than 100 years, Cal. Code. of Civ. Proc. § 632 provided that if a party requested findings, those findings had to be in writing.[12] The legislative history of Cal. Code of Civ. Proc. § 632 can be found at App. 132-141.

In 1981 a bill was introduced to the California State Assembly, AB 1684, o amend Cal. Code of Civ. Proc. § 632 to provide that

> "The statement of decision shall be written unless there is a verbatim record of the proceedings, in which case the statement shall be made orally on the record." App. 137.

This change did not make it through the state senate. The senate struck this entire provision and substituted:

> "The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial has been completed within one day, the statement of decision may be made orally on the record in the presence of the parties." App. 138.

This amended statute, including the change made by the senate was approved by the governor in 1981. In 1987, the statute was amended again and this provision now reads:

> "The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when

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court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment:

1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.

2. A judgment or decree not consistent with or not supported by the special verdict."

12. Cal. Code of Civ. Proc. § 632 was enacted in 1872, and only minor changes were made between 1872 and 1981.

the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties."

An oral statement of decision was not considered adequate for more than one hundred years. The 1981 amendment providing that the statement of decision could be made orally on the record if the trial was completed within one day was clearly a compromise. In *R. E. Folka Construction, Inc. v. Medallion Home Loan Co.* 191 Cal.App.3d 50, 236 Cal.Rptr. 202 (1987) the appellate court reviewed the legislative history of this statute and explained the State's interest in not providing written findings. "—findings were a pain. . . . It was in this political climate—a rational hostility to findings—that the Legislature decided in 1981 to amend section 632 . ." Id. at 54.

The petitioner's need for a written statement of decision far outweighs the State's interests in painless adjudication. *Mathews v. Eldridge* 424 U.S. 319, 334-335, 47 L.Ed.2d 18 (1976). It is not difficult to give reasons if reasons exist.

IV

The Denial of Equal Protection of the Laws is Arbitrary and Capricious.

The trial court initially acknowledged the existence of the labor agreement, and made the totally unfounded conclusion that the petitioner couldn't prove that she had done better than 90 percent of the work. She therefore would not be given an opportunity to try. This stands out as a startling and unjust denial of due process.

When the petitioner returned to court a week later with witnesses and their hand written statements, the judge adjusted the findings. Now there was no contract. Furthermore, it was unfair for the petitioner to prove that she

had done the work. At best this is a bizarre adjudication: the truth is unfair. The essential legal concept, even constitutional mandate,[13] that a man must be held to his contractual promise never entered the picture.

The appellate court has a laundry list of excuses for not requiring the trial court to provide a written statement of decision. First, there's the uncertain trial time.

Second, the appellate court questioned whether each counsel had really requested a statement of decision, despite the trial court's acknowledgement of the requests. The appellate court withdrew this objection on reconsideration.[14]

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13 "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary spoliation of property, but that equal protection and security should be given all under like circumstances in the enjoyment of their personal and civil rights, that all persons should be equally entitled to pursue their happiness and acquire and enjoy property, that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts, that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits of others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences." *Barbier v. Connolly* 113 U.S. 27, 31, 27 L.Ed. 923 (1885).

14 The court decided that respondent's counsel was "merely alluding to the prospect that a party would request a statement of decision and [did] not regard it as an actual request" for a statement of decision. Opn. 6, App. 21; underlining added.

"MR. WATSON: Finally your Honor, I would like to, because I'm cognizant of the new cases that have come down and I don't have my timer on as to exactly how many minutes we spent, I would make a request on the record before the matter is submitted for a Statement of Decision from the Court because I may not have the luxury of 10 days. It may be less than a day of trial.

THE COURT: Your request is noted, it's on the record." R.T.(A)

Instead, the court concluded that the petitioner could not take advantage of a request by respondent's counsel despite the statutory provision: "The court shall issue a statement of decision . . . upon the request of any party. . ." Cal. Code of Civ. Proc. § 632.

It seems the petitioner can't "take advantage" of any laws.

The evidence of the equal labor agreement is unconflicting and irrefutable. The State courts' decision that the equal labor contract does not exist is "without any fair or substantial support." *Ward v. Love County*, 253 U.S. 12, 23, 64 L.Ed. 739 (1920). Can these courts be blind to what must necessarily be known to every intelligent person? *Yick Wo v. Hopkins* 118 U.S. 356, 363, 30 L.Ed. 220 (1886).

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The court to retracted its conclusion that this was not a request when it denied the petition for rehearing. Order Denying Petition for Rehearing 2, App. 27. Petitioner's counsel's request can be found at R.T.(A) 258-259, App. 53.

III

The Petitioner Has Been Deprived of Fundamental Rights.

It is scarcely imaginable that anyone could acquire or possess property if the definition of the property interest was as uncertain as these courts have made the petitioner's property interest of contract. An indefinite property interest is repugnant to this fundamental right. Her right to contract has also been abrogated. What can you do with a contract if the courts ignore its existence and refuse to adjudicate it?

These courts refused to give the equal labor agreement any legal significance whatsoever. They did not declare it unenforceable or void. They did not conclude that the written property agreement is an "integrated" or "exclusive" agreement of the parties. Nor did they find that the equal labor agreement is inconsistent with the terms of the parties' written agreement.[15] They disembodied the contract from the statutes which define its existence. This nullified it. The "contract" is an apparition.

An apparition is not a property interest. If there's no property interest, there is nothing to acquire, possess or enjoy, and no rights have been abrogated. The petitioner has been disenfranchised of the law. She has been deprived of fundamental liberty interests.

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15. This is the parol evidence rule. California's version is codified in Cal. Code of Civ. Proc. § 1856. The petitioner thoroughly argued this rule in the Appellant's Opening Brief.

CONCLUSION

The right to equal protection of the laws is a personal right. *Missouri ex rel. Gaines v. Canada* 305 U.S. 337, 351, 84 L.Ed. 208 (1939); *Shelley v. Kraemer* 334 U.S. 1, 22, 92 L.Ed. 1161 (1948).

The state courts have ignored or disembodied the state substantive law which should have protected the petitioner's interests. By refusing to adjudicate the petitioner's property interest with the laws which define the property interest, the courts have arbitrarily denied her equal protection of state property and contract laws.

Cal. Code of Civ. Proc. § 632 is supposed to guard against this sort of arbitrary deprivation at the trial level by requiring that the trial court explain its decision and adjudicate within the law. Instead, litigants are denied equal protection of this law because the assertion of the right to a statement of decision is conditioned on an event which the litigant cannot control.

This case also shows that an oral statement of decision does not meet minimum federal due process requirements. The right to due process is not conferred by the California legislature or by the California courts. It is a constitutional guarantee. Cal. Code of Civ. Proc. § 632 does not meet that guarantee.

The petitioner asks this Court to grant this writ in order that litigants in California may protect their right to rational and just adjudication of their disputes and to equal protection of the laws.

Respectfully Submitted,

Charlotte Hamann
In Pro Se
P.O. Box 1096
El Cerrito, CA 94530
510-741-7874

No._____

In The

Supreme Court Of The United States

OCTOBER TERM, 1993

CHARLOTTE A. HAMANN

Petitioner,

v.

RICHARD S. THRELKEL

Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

CHARLOTTE HAMANN
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510-741-7874
In Pro Se

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Hamann v. Threlkel

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2/20/91
834 Balra Drive
El Cerrito, CA 94530

Judge Richard Flier
Contra Costa County Superior Court
Department 15
1020 Ward Street
Martinez, CA

Dear Judge Flier,

I'm sure you will remember my case. I'm the woman who wanted to be paid for her construction work. And you gave me zip. If there are any grounds for an appeal, I will appeal your decision. My most benign view of your decision is that the attorneys made a bad deal which assured you would not be given all the facts and so you inferred the facts from how you "felt" about the case and your opinion regarding the relative value of Richard Threlkel's word and my word. However, the attorneys' deal also stated you were not supposed to infer those facts.

I was disappointed you did not reopen the trial and I don't expect you to turn your decision around. However, I hope you will consider the points I make in this letter, view the case from a new perspective, and that this new look will impact your future decisions. It is hard for many people to accept that a 5'2" woman can outwork a 6'2" man. It was hard for my neighbors too. But they saw me haul 100 lb bags of concrete on my shoulders, dig the trench for the new water main, and manhandle 2"X12"X16' lumber. They know, and you have acknowledged, that my construction expertise greatly exceeds Richard Threlkel's. My neighbors were appalled by the injustice of your decision, believed you did not have all the facts when you made it, and came to court to do what they could to turn you around. But you wouldn't

give them five minutes. Whether the work was skilled or unskilled, judged by brain or brawn, valued by hours or dollars, I outworked Richard Threlkel 10 to 1.

I think the trial transcript will clearly show you believed Richard Threlkel when he told you he had done 60% of the work. I think your decision to rule against me on the unjust enrichment was based more on your belief he had told you the truth and that any analysis of the actual work done by each of us would be a wash, than on any legal argument. Your later statement about how "unfair" it was for me to ask to be paid at this late date was just smoke. I said in court, on the record, that in addition to believing the contract covered my work, Richard Threlkel and I had several discussions during which he clearly told me I would be paid when the work was complete. You ruled the written contract didn't cover labor, but a verbal contract and a clear understanding of equal sharing existed which did cover labor. When Richard Threlkel moved out of the house, the work was close to being complete and I had been working my butt off to finish it. He knew it was time to pay up. As far as modifying the contract in writing to cover my work: why would I modify it? I thought I was covered. The contract was only modified when there wasn't a 50/50 split. Money is fair exchange for labor.

When you saw my neighbors in court, you suspected Richard Threlkel had lied to you about who had done the work, even without listening to or reading their declarations. This is clear from your revisionist statements about the amount of work I had done relative to the work he had done. Copies of my neighbors' declarations are enclosed with this letter. I want to believe you have the integrity and courage to read their statements. If, and after, you read them, ask yourself if a man who would lie so brazenly about the work, would not also lie about a verbal agreement and renege on it. Richard Threlkel's false claims are not based on a perceptual problem. During his deposition he also lied and claimed he

had done work that I had done. My construction professionals could have exposed him in court because of his ignorance with respect to how the work was actually done and could have been done. He lied in your court because he knew no one except me would be there to confront him because of the "deal". And he lied because he knows there is no penalty for lying; he had everything to gain, and nothing to lose. I could produce seven more statements, similar to the ones enclosed, from other neighbors or construction professionals. Richard Threlkel couldn't produce one. What was he doing while I was working? In the words of one neighbor: "I often saw him sitting on the back porch swing listening to the radio and reading a book, while you were working."

You said you thought I would buy the house. How did you ever think I was going to buy the house if I wasn't paid for my work? I couldn't buy the house because the equivalent of 3-1/2 years of my full time labor went into making the house more valuable and during that time I did not receive a paycheck and was not paid for my work. My construction and landscaping labor is easily worth $80,000. My 2 years lost wages as a chemist or engineer cost me more than $70,000. I made $35,000 in house payments during the last two years. You gave almost all of this to Richard Threlkel. You also said you were giving me a big break by giving me first option to buy the house. I don't think so. The contract gave me that right and if you were going to enforce the contract, the option was already mine. The 90 day requirement of the contract also meant the appraisal of the house should have been been based on March sales. Richard Threlkel's realtor couldn't justify her March estimate until 3-4 months later; during this period of time the El Cerrito real estate market was increasing at an annual rate of 21%. Figure it out. That 21% rate is nearly the difference between the appraiser and the realtor. The objective of the contract was not to determine what the house would sell for at some

future date, 4 or 6 months down the road. The objective was to to value the house as of the dates of the March appraisals and to settle within 90 days of the date of separation.

The absolute worst result of your decision is that I have not yet been paid for my work. I was cheated by Richard Threlkel, who has become a liar and a crook. So were you.

Charlotte Hamann

2-5-91

Judge Flier

Sir

I feel my forty plus years in construction work, many of these spent a carpenter foreman I am qualified to comment on the Hamann Threlkel remodeling project.

Passing the job site daily both driving and afoot it was second nature for me to observe the progress and to note who was at work as well as who was not. After the initial thrust i.e. the first few months of occupancy during which I saw Rick and Charlotte working together on the house, I saw Rick working less and less and Charlotte doing a majority of the work.

During the two year period that Charlotte was away at school it was my impression that very little was accomplished on the remodel.

In short and to sum up, it is my opinion that Charlotte did much much more of the actual labor than Rick as well as the planning, and providing the expertise that makes their house so livable and attractive.

Yours Truly

Roy E. Parker
819 Balra Drive
El Cerrito

February 6, 1991

TO WHOM IT MAY CONCERN

During the time that Charlotte Hamman and Richard Threkel lived together at 834 Balra Drive it was my distinct perception that Ms. Hamman did by far the majority of the work, both in the house and in the yard, of remodeling and landscaping. From time to time I saw them working together on projects; however, most of the time they worked on independent projects and Ms. Hamman worked continually from early until late. My recollection is that Mr. Threkel worked in a rather desultory fashion, using the weekends mostly to rest from his regular employment. During the time before she went away to graduate school, and before she began work as an engineer in the Bay Area, I saw Ms. Hamman working every day that I was around, during the week as well as on weekends. It was common knowledge in our neighborhood that Ms. Hamman did the majority of the work that was done on the house and the yard.

Nancy Ann Goolsby
838 Balra Drive
El Cerrito, Ca 94530

To whom it may concern:

Our observation of the work accomplished by Charlotte around the house in question, exceeded by far, any work that we saw being accomplished by Rick.

In our estimation, Charlotte accomplished over 90% of the work we observed over and above any work which we observed being done by Rick. The only work we saw being accomplished by Rick, was in the garage on the table saw.

Even when Charlotte was away at school, we very seldom saw Rick working in the front yard. Charlotte would come home during her semester breaks and vacations and would work in the yard and equal or exceed the output of a stevadore working on the docks and ships.

We have seen Charlotte handle sand & gravel, 4 X 8 sheets of paneling, sheet rock, railroad ties and huge boulders placed with precision in their front yard, besides building retaining walls and plating shrubs, trees and ornamentals.

Mr. & Mrs. George Elvin
841 Balra Drive
El Cerrito, CA 94530
Ann M. Elvin 2/6/91

TO WHOM IT MAY CONCERN:

It is a sexist stereotype to consider males the sole reservoir of the skills required to maintain or remodel a house. Frankly most men don't know a soffit from a fascia and never will. A woman may put saw, hammer, and drill to as good purpose as a man and may exceed the man in skill, design, energy, and persistence. I am pleased to have met such a woman and she is Charlotte Hamann.

Charlotte's technical knowledge and skill at construction are a force to reckon with. She could leave her chosen field, strap on a carpenter s apron, and be welcome at any construction site. My wife and I have watched her at hard labor for years and are of the opinion that she contributed the majority of the skill and labor that went into the job. It would be a grave miscarriage of justice if her contribution goes unrecognized.

Roy Trumbull
833 Balra Dr.
El Cerrito

Feb. 6, 1991

To Judge Richard Flier:

I live directly across the street from 834 Balra Drive, the property in question.

Prior to the time Charlotte Hamann was away at school, she worked full-time on improving the property. I saw her regularly, often using power tools in the garage, or working in the yard. We would chat briefly on the sidewalk and she told me what she was working on at the time. I know that she built a gate to the backyard, and put in drainage along one side of the house.

When the remodeling was done, I observed Charlotte sitting at the dining table (which faces street - through the window) for 3 days. When I asked her what she was doing, she told me she was studying the electrical code so she could do the wiring. She also invited me in to see the major repairs she was making in the living room ceiling.

During the years Charlotte was away at school I saw very little of Richard Threlkel. He spent much less time maintaining the landscape in the front than Charlotte had spent, and it doesn't appear he did much work on the inside of the house.

There is no question in my mind that a great majority of the work done to improve the house was performed by Charlotte. I hope you will give her contribution consideration.

Patricia Turnbull
833 Balra Drive
El Cerrito, CA 94530

831 Balra Drive
El Cerrito, California 94530
February 6, 1991

The Honorable Richard Flier
Contra Costa County Superior Court
Martinez, California

Sir:

I want to give you my views on the relative contributions of Charlotte Hamann and Rick Threlkel to their home improvement project. I live at 831 Balra Drive, El Cerrito, which is directly across the street from their house at 834 Balra Drive.

My views are based on observations of Rick and Charlotte in their garage workshop and in their home. I retired from my electrical engineering job in November 1983, and since then have been home most of the time.

My conclusion is that Charlotte contributed considerably more than Rick to the overall remodeling project both in labor and in construction expertise.

Also, I am aware that Charlotte has documented in detail the work that she did and its value. I assume that Rick has developed similar information. I feel that the court should consider this documentation in its deliberations.

Yours truly yours,

Ronald A. Lernberg

831 Balra Drive
El Cerrito, California 94530
February 23, 1991

To whom it may concern:

The following is an expanded statement on the relative contributions of Charlotte Hamann and Rick Threlkel to their home improvement project. I live at 831 Balra Drive, El Cerrito, which is directly across from their home at 834 Balra Drive.

On February 7, 1991, I was present in the Contra Costa County Superior Court presided over by Judge Richard Flier. I was available to state my view that Charlotte had contributed considerably more than Rick to the overall project both in labor and expertise. However, I was not given the opportunity to do this.

My perceptions are based on observations of Rick and Charlotte in their garage workshop, in their house, and in their front and back yards. I retired from my electrical engineering job in 1983, and since then have been home most of the time.

From 1983 to the present, I have continued to be impressed with Charlotte's knowledge of construction techniques, including plumbing and electrical wiring methods. She has acquired this knowledge through her own effort and study. She has studied the various codes in depth. Also she has acquired contemporary gardening and landscaping skills.

Over the years, I have seen Charlotte doing rough carpentry, interior finish work including the installation of hardwood flooring, electrical wiring, brick work, plastering, roof maintenance. window maintenance. wood finishing, preparation for painting, painting, and detailed landscaping. I have seen Charlotte operating the various power tools used

in construction work. A common sight in front of 834 Balra was Charlotte removing all varieties of heavy building materials from her truck.

During the many months-in excess of two years-that Charlotte worked full time on the property, she worked long hours each day with enthusiasm and vigor. Her work is of excellent quality.

834 Balra Drive has been transformed from a quite ordinary place to a very unique and desirable property. My overall assessment is that Charlotte contributed far more than Rick to this transformation.

Also, I am aware that Charlotte has documented in detail the work that she did and its value. During the eight years that I have known Charlotte, I have found her to be an exceedingly honest person, exacting, and with high standards. I have great confidence that the documentation is factual and accurate.

Furthermore, I feel that justice will only be done if the court recognizes Charlotte's true contributions and compensates her accordingly

Very truly yours,

Ronald A. Lernberg

2/2/91

It is the opinion of each of us that Charlotte Hamann did significantly more improvement, repair, and maintenance work on the residence at 834 Balra Drive than Richard Threlkel did during the years of 1981 through 1988. The amount of work done by each of them was nowhere near equal. Each of us presently lives on Balra Drive and have lived on Balra Drive longer than Charlotte Hamann or Richard Threlkel. Our opinions are based on observation throughout the time period they lived in the house. Our observations are of actual time spent working and our opinions refer to that amount of time and not to the dollar value of the work done.

George Elvin	841 Balra Drive	2/2/91
Ann Elvin	841 Balra Drive	2/2/91
Nancy Ann Goolsby	838 Balra Drive	2/2/91
Patricia Turnbull	833 Balra Drive	2/2/91
Roy Turnbull	833 Balra Drive	2/2/91
Ronald Lernberg	831 Balra Drive	2/3/91
Roy Parker	819 Balra Drive	2/3/91

4/16/91
834 Balra Drive
El Cerrito, CA 94530

Judge Richard Flier
Contra Costa County Superior Court
Department 15
1020 Ward Street
Martinez, CA

Dear Judge Flier,

This is another letter from "the woman who wanted to be paid for her construction work." Ten weeks have passed since your decision, but I'll spare you any more detail and hope this is adequate introduction.

After receiving the trial transcript from Betty Hoffman two weeks ago, I read and reread your decision, trying to make sense of it. I can't figure out if you ruled on quantum meruit or just commented on it. I discussed this with several attorneys, other than Larry Moll, and there is no consensus. If you did rule on it, we can't figure out the rationale from the transcript. The question arises not only from the content of the transcript but also the fact Larry Moll neglected to include quantum meruit as an issue in his Issues Statement. I realize you're a busy man, so a simple yes or no will do. I'm enclosing a postcard addressed to me.

If you cannot tell me, by mail, what your decision was on quantum meruit, please advise me and I will come to court with an attorney. Thank you for your time.

Sincerely,

Charlotte Hamann

SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA
COURTHOUSE
MARTINEZ, CALIFORNIA 94553

RICHARD S. FLIER
JUDGE
DEPARTMENT 1 5

April 22, 1991

Lawrence Moll
Kletz & Moll
5315 College Avenue
Oakland, Ca 94618

re: HAMANN V. THRELKEL, C89-03498

Dear Mr. Moll:

Enclosed are two letters sent by Ms. Hamann directly to me following the hearing on this matter but before any final orders have been signed or any post-hearing motions are heard.

I can certainly understand the consternation that any party may feel after a ruling is made in a hearing or proceeding; however, it is not clear that your client comprehends the inappropriateness of these letters.

I am writing to bring to your attention your client's unsolicited

attempts to contact the court. As you know **ex parte communication** is not only inappropriate but also is unethical.

I am specifically **prevented** from responding to her directly due to the Judicial Canons of Ethics. I mean no disrespect toward your client; however, it would be in keeping with an attorney's obligations to his client and the court to encourage your client to desist from these inappropriate contacts. I can only assume that you were not aware of the previous letter and did not induce her to write either note.

I feel an obligation to send copies of this letter as well as Ms. Hamann's letters to Mr. Watson. For purposes of a further record, I will maintain the originals of these letters in a sealed portion of the case file.

I apologize for the need to send this letter to you, but based upon the circumstances I have no choice.

Moll, April 22, 1991, pg. 2

Thank you for your attention to this matter.

Sincerely yours,

Richard S. Flier

encl: letter 2/20/91
letter 4/16/91

[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

RICHARD S. THRELKEL,

Plaintiff, Cross-defendant and Appellant,

v.

CHARLOTTE A. HAMANN,

Defendant, Cross-complainant and Appellant.

_____/

FILED
January 26, 1993

A054468
(Contra Costa County Super. Ct. No. C89-03498)

This appeal concerns the interpretation of a property agreement between cohabiting parties with respect to their common residence for a period of more than seven years. On May 1, 1981, Richard Threlkel (hereafter Threlkel) and Charlotte Hamann (hereafter Hamann) purchased a home at 834 Balra Drive, El Cerrito, California, which, except for a brief period, they held as joint tenants. On November 27, 1982, they entered into a "Property Agreement" defining their respective rights and obligations with regard to the property.

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The Property Agreement provided that the parties would "contribute equally to the downpayment, all closing costs, monthly mortgage payments, and insurance" and that

each would "be responsible to pay one half of all property taxes and costs of repairs and improvements except as noted in record book." The agreement further provided that if the parties should separate, the party desiring to remain in the house (or the party chosen by a flip of a coin) would pay the other party "his or her share of the equity." The equity was "defined as the difference between the fair market value and any encumbrances on the house." In the absence of an agreed valuation, the fair market value would be determined by an appraisal. Under the terms of the agreement, "[t]he appraisal shall be arrived at as follows: each shall designate one licensed real estate broker or salesperson who is familiar with the neighborhood where the house is located to make an appraisal. The two appraisers shall jointly agree upon a third licensed real estate broker or salesperson to make a third appraisal. The fair market value of the house is the average of the three appraisals." Finally, the Property Agreement specified the financial terms under which one party would purchase the other's share.

Threlkel and Hamann resided together in the house until Threlkel moved out in January 1989, following their mutual decision to separate. During all this period, Threlkel was employed full-time as a chemist. Shortly after moving into

[3]

the house, Hamann left a Ph.D. program in chemistry at the University of California at Berkeley and devoted her working hours entirely to repairing and remodeling the house for the next 19 months. She then successfully pursued a degree in chemical engineering and secured other remunerative employment.

By all accounts, the house was in deteriorated condition but possessed many possibilities for improvement.

Over seven years, Threlkel and Hamann invested nearly $60,000 in repairs and new construction. Though they contracted out certain jobs, they did most of the work themselves. Hamann offers to prove that her labor had a reasonable value of $58,479 and represents more than 90 percent of the labor contributed by the couple. Disputing Hamann's contribution, Threlkel claims he did 60 percent of the work.

The parties kept a ledger of all construction expenses and, by the time of their separation, they had assumed equal responsibility for all payments for building materials, tools, and construction work. They kept no written record of the labor they expended themselves on the project.

After their separation, Threlkel retained a real estate broker to appraise the fair market value of the house pursuant to the terms of the Property Agreement. Setting the value at $285,000 to $295,000, the broker commented that the remodeling work had greatly enhanced the property's value. For her part, Hamann retained a professional appraiser with experience in construction lending who assigned the property a

[4]

value of $263,000. Threlkel refused to acknowledge this appraisal, claiming that it violated the Property Agreement because it was performed by a professional appraiser rather than by a licensed real estate broker or salesperson as the literal language of the agreement specified.

On August 24, 1989, Threlkel filed suit against Hamann seeking specific performance of the Property Agreement or, in the alternative, partition by sale. The cause of action for specific performance alleged that Hamann had "stated her intention to purchase Threlkel's interest" but had failed to obtain an appraisal by a "real estate broker or

salesperson" as they had agreed. It prayed for an order that Hamann obtain an appraisal by a properly qualified person and to cooperate in the selection of a third appraiser.

Hamann countered by filing a cross-complaint for joint venture dissolution, declaratory relief, and quantum meruit recovery." In each cause of action, she sought to receive the benefit of the labor she had personally invested in the restoration and remodeling of the house. The first cause of action demanded "an accounting of the joint venture business including an accounting with respect to all labor and services and costs of repairs and improvements done, made or paid for by [the parties]." The second cause of action prayed for a declaration clarifying the Property Agreement in several respects, including a declaration "that both parties are

[5]

entitled to be credited with the reasonable value of all services each party provided in maintaining, repairing and remodeling the real property . . . ." The third cause of action alleged that "cross-defendant became indebted to cross-complainant for work, labor and services" that she rendered in improving the house.

At the close of trial, the trial court delivered a lengthy oral statement of decision. Although the decision in many respects steered a middle course between the interests of the two parties, the court found that "there was never an agreement regarding labor" and disallowed recovery for labor on a quantum meruit basis. Hamann subsequently changed her mind about purchasing the house, and Threlkel sought to negotiate the terms of purchase. The final judgment, relying in part of stipulations of the parties, set forth the terms for Threlkel's purchase. Among other things, the court gave the property a fair market value of $285,000 and required Threlkel to remove Hamann's name from the secured indebtedness or

face substantial penalties.

In this appeal, Hamann contends that the trial court erred by refusing to prepare a written statement of decision and in finding that there was no agreement allowing credit for labor expended in the home improvements. Although Threlkel has filed a notice of cross-appeal, he urges only that the entire case should be retried if the court orders retrial of the labor issue.

[6]

Faulting the court for failing to prepare a written statement of decision, Hamann maintains that Threlkel's counsel requested a statement of decision before the case was submitted for decision and that her own counsel again requested a statement of decision concerning the labor issue on February 7, 1991 -- one week after the court orally delivered its decision from the bench. We read the remark of Threlkel's counsel as merely alluding to the prospect that a party would request a statement of decision and do not regard it as an actual request for decision under Code of Civil Procedure section 632.

The statement of Hamann's counsel is more difficult to interpret. The parties then contemplated a stipulation controlling Threlkel's purchase of the property. Hamann's counsel inquired, "Just one other issue then before we leave. I guess what I would like to know is that we want to, you know, preserve a record on the -- as far as the issues of labor are concerned and are going to request a Statement of Decision at least as respect the labor aspect. [¶] Would it be the Court's ruling, would we be precluded from doing, if we enter into a statement regarding buy-out? [¶] THE COURT: No, I think for your issues of appeal, the Statements [sic] of Decision is on the record. I told you my ruling on the record. I've already made my decision. I'm either right or I'm wrong."

As Threlkel construes this colloquy, Hamann's counsel was asking whether the stipulation under consideration would preclude him from requesting a statement of decision and

[7]

proceeding with an appeal. The court replied "no"; he could appeal from the statement of decision on the record. Hamann points out that the hearing represented the opportune time to request a statement of decision - she had only 10 days from the announcement of the tentative oral decision to request a written statement of decision - and she contends that her counsel in fact intended to request the statement pursuant to Code of Civil Procedure section 632. The court effectively denied the request, she contends, by stating that the oral statement of decision would suffice.

Although the court's oral statement of decision, like nearly all extemporaneous remarks, contains ambiguities and certain arguably inconsistent statements, we do not hesitate to find that it fulfills the statutory requirements of a statement of decision. The statement contains "findings of ultimate, rather than evidentiary, facts . . . [that] are sufficient to adjudicate the essential elements [of Hamann's case]." (Bulmash v. Davis (1979) 24 Cal.3d 691, 700-701.) For example, the court unquestionably found that there was no agreement regarding credits for labor invested in the house improvement. The critical issue is rather whether the court was obliged to issue a written statement of decision. This issue turns not only on interpretation of the inquiry of Hamann's counsel but also on the length of the trial.

Code of Civil Procedure section 632 provides: "The statement of decision shall be in writing . . . however, when the trial is concluded . . . in less than 8 hours over more

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than one day, the statement of decision may be made orally

on the record in the presence of the parties." Threlkel calculates that the trial consumed only 7.5 hours. But he states that the court adjourned at 4:30 p.m. on January 30, 1991, when the record shows it adjourned at 4:45 p.m., and he fails to document the precise time that the court opened in the morning of January 30, 1991, and closed on the afternoon of January 31, 1991. Adopting another approach, Hamann calculates the average time elapsed per page of transcript for a period in which the court time is known and multiplies it by the pages in the remainder of the transcript. This method indicates that the trial consumed 8.7 hours.

No principle of appellate procedure is more firmly established than the presumption in favor of the trial court's judgment. "'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principal of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (Denham v. Superior Court (1970) 2 Cal.3d 557, 564; Walling v. Kimball (1941) 17 Cal.2d 364, 373; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 268, p. 276.) The principle applies here. The confusing colloquy between Hamann's counsel and the court does not disclose an unequivocal request for a statement of decision under Code of Civil Procedure section 632 or an unambiguous

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denial of such a request. Again, the record regarding the length of trial is subject to conflicting interpretations. An appellate court requires a clearer record, which affirmatively discloses error, as a predicate for reversing the judgment of the trial court.

Hamann invokes the rule of Parsons v. Bristol

Development Co. (1965) 62 Cal.2d 861, to argue that the interpretation of the Property Agreement presents a question of law: "Since there is no conflict in the extrinsic evidence in the present case we must make an independent determination of the meaning of the contract. " (Id. at p. 866; see also 9 Witkin, Cal. Procedure, supra, § 295, p. 306.) Appearing in propria persona, she has submitted a remarkably competent brief, displaying (one may imagine) the capacity to learn an unfamiliar discipline that she demonstrated in restoring and remodeling the house. We conclude, however, that the argument falls well short of showing that her interpretation is supported by uncontroverted evidence. She indeed makes a plausible case for the interpretation that the agreement to divide costs embraced the reasonable value of the parties' labor, but other evidence supports the trial court's interpretation that there was no agreement with respect to labor.

Denying the existence of an agreement on labor, Threlkel testified that the Property Agreement was based on a form appearing on page 137 of a book entitled "Living Together

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Kit." The same section of the book on page 143 contained an agreement that would take into account the party's respective labor. He insists that he and Hamann considered this agreement and specifically rejected it. They understood the phrase "costs of repairs and improvements" to refer only to out-of-pocket expenses. Thus, during the years that the home improvements were in progress, they kept records of all expenses in a ledger but made no entries -- and kept no other records -- regarding their respective labor.

Where the meaning of a contract is in dispute, "[t]he long established rule, still followed, is that where the extrinsic

evidence has been properly admitted and the evidence is in conflict, any reasonable construction by the lower court will be upheld under the general rule of conflicting evidence." (9 Witkin, Cal. Procedure, supra, § 293, p. 304; Quader-Kino A. G. v. Nebenzal (1950) 35 Cal.2d 287, 294; Stratton v. First Nat. Life Ins. Co. (1989) 210 Cal.App.3d 1071, 1084.) Under the rule of conflicting evidence, Threlkel's testimony is sufficient to support the trial court's finding that there was no agreement on labor. "[I]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony

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is, under the rule which has always prevailed in this court, to be resolved in favor of the finding." (Bancroft-Whitney Co. v. McHugh (1913) 166 Cal. 140, 142.)

The judgment is affirmed.

_____

Newsom, Acting P. J.

WE CONCUR:

_____

Stein, J.

_____

Dossee, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

RICHARD S. THRELKEL

Plaintiff, Cross-defendant and Appellant,

v.

CHARLOTTE A. HAMANN,

Defendant, Cross-complainant and Appellant.

_____/

FILED
February 25, 1993

A054468
Contra Costa County
No. C89-03498

ORDER DENYING REHEARING
and
ORDER MODIFYING OPINION
[No Change in Judgment]

THE COURT:

The Petition for Rehearing is denied.

It is ordered that the opinion filed herein on January 26, 1993, be modified in the following particulars:

1. On page 6, delete the last sentence of the first paragraph and in its place, insert the following:

"Hamann cannot, however, seek reversal of the judgment for failure of the court to honor a request of Threlkel's counsel."

2. On page 6, the first sentence of the second paragraph be modified to read:

"The statement of Hamann's own counsel is difficult to interpret."

****

There is no change in the judgment.

****

Newsom, Act. P.J.

[2]

TRIAL COURT STATEMENT OF DECISION

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THURSDAY, JANUARY 31, 1991 AFTERNOON SESSION

PROCEEDINGS

THE COURT: Okay. We're back on the record on Threikel versus Hamann.

And, Counsel, what I'd like to do is deal with the agreement first because that's the heart of just about anything I would say about resolutions after that.

And what I'd like to deal with first is the paragraph 3 of the agreement of November the 27th, 1982. Which says that, "That we will each be responsible to pay one-half of all property taxes and costs of repairs and improvements except as noted in the record book."

The one comment that I'd make to both sides in this, I think this was an area that had been considered and discussed by the parties. I don't think this is an area that they hadn't evaluated and considered.

Mr. Threikel, from his standpoint, says that, We did talk about labor and we did talk about such things as our devoting time and our doing this work ourselves. That was something that we did talk about. We felt it would be about equal. We didn't put it in. We had the power to put it in. There were clauses in the book that would entitle us to put it in. We didn't put it in.

And I think the same is true for Ms. Hamann. She indicated it was understood at the time the contract was entered into, thought, intuited (sic) something that was at

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least the topic of consideration that the parties would participate equally in the various improvements that were being done.

So, just in terms of contract interpretation, my sense of what the parties meant when they said, "costs of repairs and improvements", means, "out of pocket." It doesn't mean, "labor", it means, "out of pocket." It means, "third party labor" to the extent that that actually costed money because that was one of the things that the parties split. It was one of the things, looking at the notebook, the parties kept track of for purposes of equalizing things because those were the sorts of things the parties wanted to equalize.

As time went on in this particular agreement, and I would make an observation, there was a point in time when I was doing family law which deals with couples and how they deal with each other, and my sense is at least 80, 85 percent of the time there is a dissolution of a couple it revolves around financial matters. The financial pressures of couples in our society is such that that seems to be the areas where people will at least start to move apart.

This couple lived very well together for a number of years until I think financial matters got the best of them. They had made this agreement I think in good faith to try and avoid these sorts of problems. And even reading from the book that they used, I think they took quite by the gospel, We advise you to write things down not because

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we believe that most people are untrustworthy, but because we know from experience over time memories tend to blur. We ask you to make a small leap of faith and believe us when you tell us that sensible written agreements can do much to -- (inaudible). They are best made when you think you will never need them, not when storm warnings are flying. (sic)

I think what happened in this particular case is exactly that, The agreement, especially as it relates to Clause No. 3,

deals with what the parties felt were going to be the sorts of things that they would want to split. And labor was not one of them. Labor was always assumed would be something that they were going to share in the actual building of these additions.

Moving forward in time to the time when the actual additions are put on, the actual addition of work was put on, I thought it was curious that the way Ms. Hamann evaluated her services to the partnership, if you will, was not by trying to count up the number of hours she had worked and then comparing too the number of hours that Mr. Threikel worked, because under the spirit of the contract that's what it meant to me. It wasn't a case where I am doing $20 an hour design work, I am doing $25 an hour plumbing work. The spirit of the contract was, I'm doing an hour, you should do an hour, regardless of what that work is.

But that wasn't the concept that, that Ms. Hamann used when she was defining the value of labor. She went

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and got estimates of what her work was worth on the outside. And from that standpoint I think that sort of use of the term "labor" completely goes against the spirit of the agreement. It wasn't a quantum meruit agreement you/I do one hour of work, you do one hour of work, and we're going to feel just whether or not your digging ditches on the outside, I'm putting in electrical work, it's going to be the same hour, it's going to be fair because we're both working toward that same, same end result.

When things began to change in the agreement, the parties had the ability to put down in writing what their thoughts were. No doubt about that. That's shown by the time when Ms. Hamann was living in Minnesota and the parties, as you said, Mr. Moll, they agreed to certain things verbally and then they were able to communicate those and set those out in writing even at a subsequent time.

There is no dispute between the parties here, from the

testimony I saw, that there was never an agreement regarding labor. There was absolutely never, We agree to do thus and so.

There were complaints about labor. There were complaints that Ms. Hamann said, I think I'm doing more work than you, Richard, and it's time to do something about that.

Richard's comments back was always, But we aren't finished yet, let 's see that we get finished.

I don't know that that's necessarily a

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putting-off-type situation as much as it is saying, We're only halfway through the project. You don't know how many hours I'm going to have to put in, you don't know how many hours you're going to have to put in. You just don't know.

It would have been the easiest thing in the world if these parties were concerned then, rather than now when the time comes to split up the house, to merely set out, We are now going to start keeping track of the hours worked. So that there can be some equitable distribution of time when we come, if we come to that time when it's time to split the sheets. That didn't occur here.

And I think the inequity is not only the inequity from Ms. Hamann's standpoint that she did put in, at least from my perception of what happened, she did put in the hours, she did train herself so she could do these additional functions.

But the inequity also comes to the point that she had, I don't know if it was necessarily a hidden agenda, but she had these things that were festering in her mind about the time she was putting into the project she at times communicated to Mr. Threikel, but never alerted him to the fact that, you know, You'd better start keeping track of your hours because I'm keeping track of my hours, and there's going to come a time when we are going to add up our hours.

So the inequity not only deals with the fact that she may have done more actual work, more hours at the job. But the two of them were never led to believe from the sort

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of contact and relationship that they had that hours were going to be something that they had to keep track of.

Number one, I don't think Clause No. 3 that the parties ever anticipated that labor was going to be something they would keep track of. I'm not going to interpret that, it's implied in the agreement.

I'm not going to allow quantum meruit because quantum meruit, in my sense, is also an equitable type proceeding and the manner in which these parties conducted themselves with each other does not suggest that the Court should impose that sort of equity. It would be an inequity for me to force either of the parties to try and reconstruct the numbers of hours they each put into this house for the purpose of trying to then resolve how much the house is worth to each of the parties when they divide it up. I think it would be a futile function. It would be a futile function.

Not that I don't think Ms. Hamann could get someone in and estimate her work, and I think her work added thousands of dollars to her house. It isn't I don't think that could be done. I think the agreement is, Was an hour, is an hour, unless the parties could really go through: I worked "X" number of hours, he or she worked "Y" number of hours, and the difference is "Z," we're then going to attribute some value of "Z." Unless the parties could do that, I don't think that quantum meruit should apply.

And my sense from the testimony of both is that

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the parties really can't do that. You really can't go back now two, three, four years and try and remember how much time you took to take a sledge hammer and break out a foundation, or how much time it took to clean up a place.

Not to mention the time that, from the standpoint of eveness, how much time Mr. Threikel kept doing other things — when Ms. Hamann wasn't at the house, when she was in Minnesota not able to do on a day-to-day basis, such as

various maintenance, and work on the house.

So based upon those considerations the contract is the contract. The parties sat down. They designed what the parameters of the contract were going to be. There were some changes in time, but they weren't the sort of changes that either necessitated or in equity should be part of the -- this Court's decision as to what the contract means that deals with Clause No. 3.

We deal now with Clause No. 5.

Clause No. 5 is a situation where there are two things that I think lead to ambiguity. And I was looking at the book that you gave me, your planning book. And was trying to figure out where these people came from that designed this book. And the best I can see it was printed in New York, and I don't know if these people have any idea of what happens in California or not. Or what realtors are like in New York versus California.

I have heard, although I've certainly received no evidence in this case to make the determination, I heard that realtors in other parts of the United States have the

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power to make appraisals.

An appraisal in real estate terms is a specific thing. It's a very well-defined thing in California. It's probably not a well-defined thing in other parts of the United States.

I'm satisfied that the parties used Clause 5 almost verbatim from the book without any consideration at all as to whether or not we were dealing with a technical formal appraisal or we were dealing with something else.

I'm also satisfied that realtors and brokers in California don't do appraisals. They break out in a cold sweat every time you ask them to do an appraisal because they know, and they understand, that an appraisal is a formal technical thing and they just don't want to be bothered with it.

I'm also satisfied, though, that the parties when they wrote out this agreement were not thinking formal technical

things. They were thinking, What's the house worth? And that's all they were thinking.

From the standpoint of breaches, whether or not one party breached it or not, I'm satisfied when Threikel went out and got his real estate agent to give him the fair market value that was within the confines of the contract.

When Hamann went out and got, quote, "a formal appraisal," that was an understandable thing that she did because she went and, yes, she did not go and get a broker or a salesperson, she went and got a person who could do, quote, "an appraisal." And I think she was trying as hard

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as she could to comply with the contract terms.

I would not, based upon the conduct of the parties, I would not necessarily punish either party for the failure to comply with Clause No. 5. I think it would be inequitable, inappropriate to do that because there is definitely an ambiguity in the contract.

The contract is prepared by people not used to California law. It's prepared by people who probably didn't realize they were using technical terms when they used the term "appraisal" rather than a less technical when they say, Find out from a person who would know what the value of this property is so you can go from there.

And in reading the portions in the book that deal with this, my sense is that the authors of the book don't realize that an appraisal in real estate terms has wholey technical meaning. They just glossed over that completely. They just wanted someone who was in the know come out and give a fair value on the house.

Where do we go from here is something I would merely call to both counsel and both clients' attention. I'm willing to suggestion certain things that can be done. My sense from the commitment to the house itself is that Ms. Hamann should have the right to buy the house first.

So my sense is that if there's any equity to try and

reinstill in her what she is losing by the value of her labor, it's the fact that she should have the right to buy the house first.

I can give you folks some suggestions on how we

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can go about that. There are a couple things that I'm concerned about: Number one is that although the appraiser's appraisal and the agent's fair market value of the house were given back in 1989, if I'm not mistaken, it's clear that since 1989 the value of this house has changed. I don't know if it's gone up or down. Knowing the area, my guess is that it's gone up. But I don't know that.

If I -- if I went ahead and did a few things regarding that, you know, I could set the value of the house at some figure that's between the high end of the agent's statement and the statement of the appraisal and set a value 280, 285 which is certainly a figure which is probably reasonable for that particular house at that particular time, a fair market value of that amount. And we could go from there.

But I'm really willing to sort of put a halt in my pronouncement of the judgment and now that at least we have resolved, I believe, one of the major issues in the case, give counsel an opportunity to confer with their clients as to how we go from there.

The second thought that I have on the value just deals with this whole idea of interest. I re-read the document. Your suggestion, Mr. Moll. I can see where a reader might get confused by the Clause No. 6, but I think what it calls for is the person who's moving out to allow a mortgage to be taken.

MR. MOLL: I think that was the intention.

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THE COURT: I think that's what the meaning is.

It seems to me, that without knowing how much Mr. Threikel's ox might be gored by not going to current value of the house versus 280, 285, whatever, interest may be an offset. But I think it's appropriate to, if I'm going to put the people in that situation, I take the incumbrance as it existed at

the time that the 90 days would have run, which is back in 1989; rather than Mr. Watson's suggestion that now I somehow bring, bring those incumbrances forward and give her less of a thing to subtract from.

I'm willing to, you know, honor any suggestions that either of you make.

The bidding suggestions, I think, although it sounds good on paper, depending upon what their relative earning capacity is now, just might be a fait comple; where if Mr. Threikel really wants the house at this point he could probably outbid Ms. Hamann. My impression is he's been the one who's been more consistently working and is earning more than she is. I just got that, you know, basically from the nature of their conversations, so I don't know that the bidding option is one that's really viable.

But I'm willing to go off the record at this time and give you an opportunity to confer with your clients along the lines of what I have been saying and see if there can be some agreement as to how we go about it.

The last thing I would mention just deals with

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the roofer and the termite report. And inasmuch as this would be a transfer between the co-owners, I have not heard anyone say that the roof is falling in or the foundation is deteriorating due to dry rot or other infestation. Those are certainly appropriate concepts to have when I'm changing ownership, but this is a situation where one or the other is going to get the house and one or the other has been the owner and the occupant of the house since 1981 when they moved in.

I just don't think that those sorts of things need to be considered when I'm dealing with how much one is going to pay to the other for the transfer of ownership. Nor do I really think, although I can be convinced to the contrary, nor do I really think the savings in real estate commissions or other closing costs are things that need to be considered. This is

pretty much, I'm buying the house from you. The house is worth so much. These are the incumbrances this is what you owe me. That's going to be deducted from the price and divide by two and that's what I'm going to pay you. And that's sort of, you know, at least a short version of how I think this particular disposition should resolve.

If the disposition itself cannot be resolved, the one thing that I think could happen that would probably be fair to both sides is to put the house on the market. You already know what the accounting is as to other matters because your book speaks fairly clear to that. Put the house on the market, get a bona fide seller and one or the

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other party would have 30 days or some reasonable period of time to match that offer. And if the offer were matched, the -- one of the joint tenants could then buy out the other and the buyer would go away.

And that's another method that wasn't suggested to me, but it's at least one method of determining fair market value, and for that, those terms, I'd be trying to determine any of the incumbrances. I don't think any of the payments from the time the contract should have taken effect 90 days after the actual demand any of the incumbrances should be taken into consideration. I would like to be more in a situation saying whatever incumbrances on that 90 days should be deducted to give the benefit, the greatest benefit to Mrs. Hamann.

All right?

I want to go off the record and give you a chance to talk with each other. And when we come on the record I'll merely want to know what the decision has been.

MR. WATSON: Might I make one comment to your suggestion?

THE COURT: Okay.

MR. WATSON: All of them are fine and considered except I don't think the last one will work.

THE COURT: Okay.

MR. WATSON: Whenever you leave the owners with an option, you don't get a legitimate buyer because the legitimate buyer is not going to take the time, they're not going to get an offer when they know someone else is going

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to buy. I don't think that's get a fair bid. Our practice, in our office, is not to have our clients ever enter into an agreement like that, we think it kills a potential sale.

THE COURT: Okay, fair enough.

MR. WATSON: That's my comment.

THE COURT: I'll hear more from both of you when we come back on the record.

MR.WATSON: All right .

THE COURT: Off the record for just a second.

(Off the record.)

THE COURT: Okay. We're back on the record and counsel are present.

The clients are present.

And, gentlemen, when we had talked I'd -- when we last recessed, I had understood there was a position taken by Ms. Hamann, through her clients, (sic) that was communicated to Mr. Watson. And was that what you wished to make a record of, Mr. Watson?

MR . WATSON: I would like to make a record we accepted their proposal. And the proposal that they made to us is this, That he pay her one-half the equity based on $285,000 as the value of the property. One-half of the equity as of 4/18/89. Plus reimbursement for the reduction in principle that she made from 4/18/89 until the date of close of escrow.

And she is to make the interim payments until the close of escrow.

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The property is to be maintained in the same condition as when Mr. Threikel left, reasonable and normal wear and tear accepted.

Escrow to close on April 2, 1991 which is 60 days, give

or take a day. And prorate taxes and insurance as of the close of escrow and there would be no interest payments due to Mr. Threikel.

And -- and that was their proposal was accepted by us.

Now, I understand they need a few days to think about it. I suggest we be on your calendar 11:30 a.m. on Thursday which is available for both of us, Thursday the 7th of February at 11:30.

If we don't resolve it, that will give Mr. Moll and me a chance to prepare some kind of a written document to be signed by the parties.

THE COURT: Okay.

MR. WATSON: And confer.

And if we do that, we wouldn't be back, but treat this like one of your normal settlements, make an OSC to see what to do with it if something goes wrong.

THE COURT: All right.

So you would be on my calendar Thursday, 11:30.

MR. WATSON: Yes.

THE COURT: Unless the matter has settled before that time?

MR. MOLL: Right.

So as I understand it, we made this proposal with

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the caveat we need appeared to -- to just review it and think it through.

If it's acceptable to both sides, we'll submit it in writing. That will be the Court's order.

If not, we'll be back and the Court will make its order.

THE COURT: Okay. All right. That's agreeable with the Court.

Then I'll put it over until February 7th, at 11:30.

Is there anything that either counsel wishes to put further on the record?

MR. WATSON: Not for the plaintiff.

MR. MOLL: Not on the record at this time.

THE COURT: All right.
Thank you, Betty. You're free to go.

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THURSDAY, FEBRUARY 7, 1991 MORNING SESSION

PROCEEDINGS

THE COURT: All right. We're back on the record on Treikel versus Hamann.

The counsel are present.

The clients are present.

And this was the time after the rulings were made last week to get back together and see what the final matters were going to be on this case.

Mr. Moll, when we chatted briefly in chambers you indicated some desire on your part to reopen. And I'd sort of like to know what I'm going to hear if I allow reopening.

MR. MOLL: Well, your Honor, I would like to reopen on the issue of the labor because I feel that the ruling that was indicated by the Court was, in fact, that there was a contract. And it did deal with labor, although you indicated it would be more in the area, you felt, the labor was more into the area of hours rather than value of work.

What our agreement was, If labor was contemplated by the contempt, (sic) we would have the opportunity to arbitrate. If not arbitrate it, at least present it to the Court. And I feel that we can show that there was a breach of the contract as found by the Court, but because of the nature of our understanding, this testimony was never

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offered or proof offered.

And today in the courtroom are numerous of the neighbors that lived in the neighborhood that observed the work going on that can testify to, you know, in large part to the huge discrepancy between the amount of labor that went on between the parties.

And I think, you know, given, if they were able to testify or they had given me written statements that there would certainly be a prima facie case that there was overwhelmingly more labor done by Ms. Hamann.

THE COURT: My concern, Counsel, and I don't mean to cut you off, but I don't see where that makes a bit of difference because the original contract didn't really contemplate labor as being an area that was going to be involved. And the parties wrote this contract. They wrote it themselves. They were in somewhat of a constant reflection on the contract every time they settled their accounts each month. Or as they were separated for a period of time, not in terms of emotion, but separated geographically, they set up their accounts and they reached agreements on that, those accounts. But the contract was never changed. And the contract was never changed at least as it relates to this area.

I don't see that labor was part of this contract. It was something that everyone understood was not part of the contract.

MR. MOLL: Well, then perhaps I misinterpreted your ruling because I was under the impression that you

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said that in fact it was contemplated.

THE COURT: No, what I said was the underlying theory, feeling, when they entered into the contract the labor was going to be about equal, because of that they didn't put in a clause in the contract.

MR. MOLL: Okay.

THE COURT: But there were all these opportunities to change that if, if, if the parties really believed that; and that's the reason why you write stuff down.

MR. MOLL: Well, your Honor, then I feel that it -- that we're exactly in a situation where unjust enrichment is a proper remedy for -- remedy for my client.

Unjust enrichment says, where a contract doesn't look at these matters, what is the value by which a party is being

enriched? What is the benefit to that party? And if you can show that there's a benefit to the other party, then the party who's done the benefitting should be compensated commensurate with that benefit.

THE COURT : The problem I have with that, Counsel, I heard the testimony of these contracting parties.

MR . MOLL: Yes.

THE COURT: And their testimony is somewhat, somewhat consistent with each other. There was never an agreement regarding labor. There are certain understandings that underlie the whole contract.

And I've heard from your client, I haven't heard

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from Mr. Watson's client, as to the sort of labor that he did in this case but the contract is clear, and the contract does not call for labor.

I understand now why it didn't call for labor because there was pretty much an understanding between the parties how the labor was going to be.

These people did not have any inability to sit down and write things out if they thought it was important. Or if they thought it was appropriate. They didn't do that.

I don't think that at this point in time it would be fair, and I'm just talking about innate fairness at this 11th hour now, that these people have split up one of them says, This is unfair, I did a whole bunch of work in this place, and I know how much work I've done in this place, and I want to be able to put that evidence in about how much work I did on this place.

And throughout this entire relationship there was never the need when there was, you know, to a gnat's eyebrow on some of the other things they did, to put things down in writing. I think it's unfair. I think it's a situation of someone saying, Gee, now that it's all over I think it's a raw deal. I want to change the contract a little bit.

MR. MOLL: But -- but --

THE COURT: What I've heard here, I'm not saying that your client shouldn't feel hurt and feel that she got cheated or that, feel that this is in some way not in --

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not, not in keeping with her sense of the realities of the situation, but the realities the Court has seen, and what both of you have presented to me, is that these parties prepared a contract. And they lived by that contract. And on a monthly basis they are reminded of what that contract meant and its significance.

And it would be unfair not for -- just for your client to say suddenly, Gee, I did all this work, I'm entitled to be paid for it. Unfair for the other side. I did work too. Maybe not to the extent that she did work, I did too, and I didn't keep track of the work I did. And no one's really going to be able to dispute that I did or the work she did. If we were intent upon keeping track of the work we did, we would have taken the book that we relied upon initially, and we would have gone back to that book, and we would have put in a clause in our contract, and we would have dated and signed that clause, just like we did on the other modification. And we didn't do that. So I just think it's inappropriate.

The time has already come when this contract, it was going to be modified, should have been modified.

MR. MOLL: The only thing I would like to respond to that is, that as the testimony made clear, it wasn't a situation though where -- where they just said, Oh, I'm going to go right along and work and, you know, and then at the end I'll modify the contract.

It was a situation where Ms. Hamann is working along and saying, Well, look at all this work I'm doing.

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Look at all this work I'm doing. Feeling she is covered by the contract. Feeling that the contract is going to have fairness in it. It's going to be fair at the end.

And getting the response back, Well, you know, it's not

finished. Wait till it's finished. Wait till it's finished.

So she was relying on the sense of fairness that the contract called for all along.

And suddenly to find at the end, Oh, the contract isn't based on fairness. I mean -- I mean, that to me is what's unfair.

You have to remember that she is working while he's collecting a paycheck. You know, he's not sharing his paycheck, he's putting it in the bank. She is assuming all of the work that she is putting in is going to get divided out because she has a contract which says, you know, We're going to split everything down the middle. We are fair. We're equal to each other.

I think to say it's unfair for her to raise it now as an afterthought, that's just is simply not accurate.

THE COURT: No, what I'm saying, Counsel, as I said last time we were together, and I'll remind you of what I said: Where the unfairness comes in is that these people would always modify the contract when times came and they had modified it in writing. They'd reach agreements, they'd reach understandings.

She knew from at least as early as the time she started doing all this work on the house, she knew that she

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was doing more work on the house. She confronted Mr. Threikel with that situation. And was pretty much put off. But she knew she was still putting in the additional work. She had no problem when she moved back to Minnesota to put that in writing. Why, why is that somehow a different situation?

Now, the unfairness comes in where when she basically accepted this, and he was entitled to believe that it was an accepted reality of their contract, the unfairness comes in several months -- several years later suddenly saying, And it's part of our contract that the time gets considered. The amount of work gets considered. There's

nothing in the contract that says that. There is nothing in the perception of the parties regarding the contract that says that.

And this is truly an afterthought. Afterthought meaning from the time the contract was originally generated until today. It didn't occur. There was never an agreement. There was never a meeting of the minds.

MR. MOLL: But when things were reduced to writing it was only after they'd figured out the form, you last figured out the dollar amounts that they got it reduced to writing it back in.

What we're saying, That couldn't be done until it was completed.

THE COURT: No.

I see, I see a lot of voluntary decisions that were made along the way in this case, Counsel. She made

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certain decisions about taking time off work to work on the house. She made decisions about, about doing other things. She made decisions about how she managed things.

And I can't say that anyone is totally the, the receiver of the short end of the stick, or the long end of the stick. I mean, they took the house that had a value when they bought it much less than they had, they made it into something, they made it into something that was substantially greater than when they bought it.

MR. MOLL: But I think that that's what really is so hard for us to give up on here, is when you say, No one ends up with the short end of the stick.

We have these neighbors sitting here who will say that this woman did in terms of, you know, putting sheet rock up by herself. I mean, you know, this is the testimony that we've agreed not to put before the Court. But in terms of, you know, learning the codes and pulling these wires and you know --

THE COURT: Mr. Moll, I accepted that as given, that she did do a great deal of work on this house. And based

upon the testimony that's before me, she did a great deal more work than Mr. Threikel testified, because I didn't allow him to put in testimony as to how much work he did on the house. I'm accepting that.

But my function in this case is to interpret that contract.

Had these people not sat down and taken so much time to set out in great detail what their arrangement's

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going to be between themselves, I would tend to agree with you. But that isn't what happened.

These people did sit down and write this thing out. They did make modifications to the contract.

She was in a position of when she was doing that precise work that she wants payment for was the very time when the contract was modified. You know, she had put in all that time.

I think this is just one of those situations where, you know, it isn't enough. The contract is the contract.

These people had wanted a different contract, they are both extremely intelligent people, they are both precise people. They aren't like -- like some people who just deal in words, these are people who deal in numbers and precise measurements and time and allotments and this sort of thing in their daily lives. They certainly were not people who did not have the ability to put down in writing what they thought they meant.

And they did put down in writing what they thought they meant. And what they thought they meant did not have anything to do with specifying labor. Had nothing to do with keeping track of labor. It had to do with doing this to our house.

And I think right at this point her feeling of unfairness is expressed on the record and off the record; deals with the idea that she felt that trust was violated. And dealt with the idea that she has done the labor and her

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partner did not.

But that belies the fact that there was a contract. I mean, why do we put contracts in writing? So that -- so that two months after the contract, or two years after the contract, or six years after the contract, the parties don't come into court and say, Well, that really wasn't what the contract meant. What the contract meant isn't really what's written down here. Don't you know I have a better recollection of what happened.

And that's the very reason we put things in writing. That's the very reason that the book they used to deal with contracts says, Write it down. That's the very reason her mother, when she told her mother of this deal, sent her the book to write it down. To get it in writing so that some stranger, such as a judge hearing the case several years after the thing goes down, doesn't have to decide what you meant and what you meant. They didn't do it.

The contract does not mean what your client wants it to mean. It could have meant that. But it doesn't.

It didn't mean it at the time it was drafted. It was never modified to mean anything different. She wanted it to mean something different. But it was never modified.

My function is to interpret that document. That document does not deal with labor.

Now, that's the ruling I made. I may have been trying to be somewhat kinder than the law would allow me to be to your client in discussing the realities of the

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contract law and for that, my fault. I should have, perhaps, been as direct to her last time as I am today.

But the contract doesn't say it. The contract didn't perceive it. The contract was never modified.

She is one party may have wanted it to be modified, but she didn't. She had the opportunity to modify. She chose not to.

That is the contract. That's all that I'm dealing with.

Okay? The motion to reopen is going to be denied. Where are we in this case?

MR. WATSON: We are prepared to accept your price of 285.

We're prepared to let her have the option to buy it at 285, less the incumbrances.

Which, if she doesn't want it, we're prepared to buy her out at the same terms.

And we do not -- you mentioned the term, interest, but didn't define that the other day. We're willing to pay the price, less the incumbrance, period.

If the Court feels, as the Court indicated, there should be some credit for payments made between the date of the last two years ago and today, then we would not be willing to agree to those payments unless Mr. Threikel received interest on the money that he has tied up, which I believe Mr. Moll and I concluded was going to be about ninety-one five, something like that. We may be off because we didn't have the figures in front of us.

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And call the Court's attention to the fact that she's had the benefit of whatever tax write-offs she had during this period of time.

Mr. Threikel has paid 550 a month in rent, which is gone, during two year's period.

I think the easiest way to resolve that, purchase price less incumbrances and leave it at that.

And he will pay that by April the 2nd, prorate the taxes and interest as of the close of escrow.

And we would want the property to remain in the same condition as when Mr. Threikel left, reasonable wear and tear accepted, and some assurance that insurance premiums will be maintained until the close of escrow so that any formula that the Court probably needs, if that's not acceptable to go little further with the Court's formula, because the way it is now the Court's formula has the purchase price, less

incumbrances.

THE COURT: Less current incumbrances.

MR. WATSON: Which is fine with us.

She wants credit for any reduction. We don't think that's appropriate.

We think reduction is about 8 or 9,000.

His interest he would receive is -- exceeds not only that, but his monthly payments, 550, exceed that.

Also we think those should be washed out.

THE COURT: Mr. Moll, what's your suggestion?

MR. MOLL: Well, we would be willing to agree to sell the property to Mr. Threikel for 285 provided,

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however, that the credit, not for the interest payments but for the principal pay down from the date Mr. Threikel moved out until the date of close of escrow, be reimbursed to Ms. Hamann.

We are -- we've not made a request to be reimbursed for interest, taxes, and insurance over this period. And the law is I think pretty clear that if we did that then they would have a right to ask for rental value. But here we're not -- you know, that's not our request.

All we're saying is that we should be entitled to the amount of pay down from the period of time since Mr. Threikel left.

I think the mortgage was about 102,000 to whatever the mortgage is at the date of escrow. That should be given to Ms. Hamann, that amount for her payments.

THE COURT: So less current incumbrances you're saying?

MR. WATSON: No.

THE COURT: I'm just trying to understand your position.

It's 285, plus principal pay down, less current incumbrances?

MR. MOLL: I guess that is how it would work out, that's right.

I mean, let's say it's now, you know, one -- let's say it's now 95,000. That's -- yeah, but that would end up splitting it.

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We're saying, she should be reimbursed for her -- for the principal pay down from that period of time.

We look at what the incumbrance was in January of 1989, and that deducted.

But then whatever Ms. Hamann has made paid for principal pay down, from then till the close of escrow, she should be reimbursed.

THE COURT: So what I hear you saying now is, is that I take 285, I subtract the incumbrances as they existed in January '89?

MR. MOLL: That's correct.

THE COURT: And then I add the principal pay down?

MR. MOLL: That's right.

Let's say the principal has been paid down $5,000 for that, that amount then be added on to what is given to Ms. Hamann.

THE COURT: Okay.

MR. MOLL: Well, that -- I guess that is really our position or feeling there would be a certain --

THE COURT: I'm just curious, Counsel. Don't I get to the same place? Isn't the difference between the incumbrances as they existed in 1989, and Mr. Watson's position the incumbrances as they exist now, isn't that difference, the principal pay down?

MR. WATSON: Yeah.

THE COURT: Unless there is some sort of aggravation that occurs in the mortgage.

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MR. MOLL: There isn't. But let me just look at it in a second.

THE COURT: Let's take a similar example. Let's say I have a $200,000 house and I have a $75,000 incumbrance on it in 1989.

MR. MOLL: Okay.

THE COURT: And between 1989 to the present, my incumbrance is reduced to $70,000. Isn't my principal pay down $5,000?

MR. MOLL: Okay. That's correct.

But what you're saying then is the principal pay down is -- so that would be hundred thirty is what's left, that gets divided by two, so you're dividing the principal pay down by two.

What our position is, Ms. Hamann made this principal pay down -- no, I guess it really does work out the same, doesn't it?

THE COURT: You know, I'm just doing the math in my head, but unless there is something that happens in the mortgage loan, itself, such as a depreciating amount or some special interest that double declines, you know, it seems like it's the same.

And if you want principal pay down, I'll -- I'm willing to do your formula. You know, I don't hear any difference.

But it would be 285 less incumbrances as they existed January 1989, plus the principal pay down as it existed at the close of escrow. If that makes your client

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feel better, that sounds likes it's the same thing.

MR. WATSON: No, it's not going to be the same thing.

What she, in a sense, she wants a hundred percent credit for reduction between 1989 and today. And we don't think that's appropriate. She had the benefit of living there. We didn't put in evidence of those things, but he has been required to go out and rent. His money has been tied up.

We think the simple way to do this, without getting involved in those spreads is: 285, minus whatever is owed at close of escrow, divide as two; then you don't reimburse him, you don't pay any interest for all the money that was tied up for two years while she's had the benefit of tax write-offs. That's fine.

MR. MOLL: I guess so there is a difference, there. We're talking, because what we're saying is that she should be entitled to all of the principal pay down during that period of time.

THE COURT : But if that's true, then isn't he entitled to some form of interest for the appreciation value of the change because she failed to comply with the contract ?

MR. MOLL: Well, no. I think you've ruled that that wasn't the case, that both people tried to, for reasons that we have heard over the past couple hours, that it, you know, they're equally at fault for not complying with the contract, number one.

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THE COURT: Why don't you -- perhaps the -- maybe the best thing to do: We have 285. We know what that figure is. Why don't you tell me what your buy-out figure is.

And, Mr. Watson, why don't you tell me what your buy-out figure is, you know?

MR. WATSON: All I need to know, she's got the mortgage book, if she tells you what's owed is 285, whatever the number is.

MR. MOLL: I don't know what the current mortgage --

THE COURT: Does your client have the records this morning?

MR. MOLL: Do you know?

MS. HAMANN: Yes, I have the records. They're in your car.

THE COURT: Okay. Why don't I see you guys at noon.

In the meantime, you get the records so we know what figure we're dealing with. Maybe it's such a small figure it isn't worthwhile talking.

MR. MOLL: I mean, it seems like whatever it comes out, I mean -- I mean, you understand the formulas. But let me just -- you want us back at noon then on that?

THE COURT: Yeah, I just want to have a figure.

MR. WATSON: If we know the difference, Judge, what the mortgage was in 1989, and what it is now, I can give you what both numbers will be in one minute.

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THE COURT: I understand that, Mr. Watson. That's why I'm asking give me the figures. This was the time we were going to come back and finalize things. I can't believe you don't have them with you, both of you.

MR. MOLL: The other thing my client has asked, if we could enter the statements of her neighbors in the record just for a full record?

THE COURT: No.

MR. MOLL: I know you've denied my motion.

THE COURT: No, no.

I'm sorry, Counsel, this was the time. You've already had the hearing. I don't see that the statements of the neighbors are of significance in the Court's evaluating a contract.

I accept the statement of the neighbors that she did substantial work, and if called to testify they would testify that she did substantial work.

MR. MOLL: Okay.

THE COURT: I'm not in any way minimizing that.

MR. MOLL: Just one other issue then before we leave. I guess what I would like to know is that we want to, you know, preserve a record on the -- as far as the issues of labor are concerned and are going to request a Statement of Decision at least as respect the labor aspect.

Would it be the Court's ruling, would we be precluded from doing, if we enter into a statement regarding buy-out?

THE COURT: No, I think for your issues of

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appeal, the Statements of Decision is on the record. I told you my ruling on the record. I've already made my decision. I'm either right or I'm wrong.

MR. WATSON: I have the numbers, Judge.

THE COURT: Okay. Do you?

MR. WATSON: We believe there was one hundred one thousand five fifty-one owed in 1989, and there's ninety-two three ninety owed. Now, the difference is approximately $9,000. The difference results in half of that is 4500, is the way I figure. If you subtract ninety-two three ninety from 285, divide that by two, she is going -- we can do that in a second.

What she really wants is, she wants to subtract the one zero one, divide that by two, then have him give her $9,000 off the top, which I think that what that amounts to, that's what inappropriate; he ought to get interest on the money. We're saying, forget interest on the money, don't give her credit for interim payments, she's lived there.

MR. MOLL: Our position is, we would have accepted if we had all pay down. If not, we would want to have the contract proceed with the third appraisal and that my client have the right to buy it out, to buy out the interest. I think that's our position.

I guess then we would submit.

But we would really want -- we would agree if we had all principal pay down, that's not all the interest payments, I wanted the Court to understand, she is paying

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like, you know, 1300 some a month. We're not talking about any of the interest, any of the taxes, any of the insurance. We're talking about just what she's reduced the principal.

So I guess, you know, while we don't absolutely accept the figures, we assume that they're fairly close and I think then the Court knows what the parameters are.

I guess I would ask for a ruling.

THE COURT: Okay.

If your statement is that you'll -- your client will accept 285, less the incumbrances as they existed in '89, plus the principal buy down since '89, and that will be the figure; then you're going to be dividing by two to see the buy-out?

MR. WATSON: No.

MR. MOLL: No.

We're saying, subtracting as of '89 the 285, less the one zero two or the one zero one five.

MR. WATSON: Judge, here's --

MR. MOLL: Dividing that by half, then adding on the full principal buy-down, which Mr. Watson has indicated to be $9,000.

Whereas, if we take it first, then divide it, it's $4500.

MR. WATSON: Here's approximately the difference is approximately the same, whether she gets 101,000 or 96,000.

MS. HAMANN: No, that's not right.

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MR. WATSON: We don't think it's appropriate to give her credit for the interim reduction.

THE COURT: Okay.

MR. WATSON: Because you can take 285, subtract two three ninety, you get hundred ninety two, divided by two is ninety-six three zero five.

The other, 285, take off hundred one, leaves you hundred eighty-three, divide by two is ninety-one. You give her the difference between hundred one, ninety-two. She gets $9,000 off the top, that gives her hundred one thousand. That means he gets no credit for insurance that's been tied up during the period of time, he's out of pocket his living expenses during the period. It's that simple.

MR. MOLL: She is out of pocket all of the interest, taxes, and insurance.

You know, we're not getting any labor or any interest for labor during this period of time and I think that the second result is a fairer result.

THE COURT: All right.

I'll go along with your position, Mr. Moll.

All right. So she will be entitled to the full amount of the buy down. All right?

MR. MOLL: All right.

THE COURT: What's your period of time, 30 days?

MR. MOLL: We would also ask, you had said 60, but if we could have 90. She has to move, find a new place to live. I don't think that's unreasonable to give you a

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time for a loan.

THE COURT: The offer is accepted and we're getting -- escrow is going to close in 90 days?

MR. MOLL: That would be, you know, obviously if we find someplace.

MR. WATSON: My client does not understand how the ruling has changed so is that he gets no interest during the period of time on the money that he has during --

THE COURT: See you at noon, Counsel.

Thank you very much. See you at noon.

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THURSDAY, FEBRUARY 7, 1991 AFTERNOON SESSION

PROCEEDINGS

THE COURT: Okay. This is back on Treikel versus Hamann.

Counsel, if I can merely make an observation maybe we can go from there.

Right now I've made a ruling on a contract.

I've asked what the plaintiff would like from their standpoint.

I've asked what the defendant would like from their standpoint.

I believe the Court's options are somewhat limited by the nature of remedies in what is actually before me: Yes, I've made a determination on the contract, but we are truly in a situation, not on the issues that were previously before me; but how, how I assess damages? And I haven't really

received sufficient evidence, if you really want to know, to assess damages.

So what I'm trying to do is determine if there's an agreement as to how this property is to be dealt with?

Some of the suggestions, just to remind you of what was said this morning, included Mr. Moll's suggestion, Okay, Judge, now that there -- you've clarified the contract, let's go back to the contract and let's get the third appraiser appointed by the two parties. Let's get a third figure and we'll sort of go from there.

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That seems to me to be something that's certainly within the realm of possibilities in this case.

But aside from that, there's a more direct way of doing it, and that's to see if the parties will reach an agreement as to how this thing is to be bought out.

So, Mr. Watson, I don't mean any disrespect to you, sir, but my concern is one of the difficulties involved in this litigation is that the parties have been unable to reach an agreement.

I had your position.

I now have Mr. Moll's position.

My sense is that, if you accept Mr. Moll's position, the litigation is over. He reserves his right to appeal certain things, but the litigation is over in terms of the buy-out.

If you do not accept his position, we may be in a negotiation situation.

This Court will not engage in negotiations on trials that are actually before it.

But I merely wanted to clarify, It isn't I believe for the Court at this point to jump in and say, This is how we're going to assess damages.

All that I was asked to do, just to remind everyone of the procedure, all that I was asked to do is give my interpretation of the contract and to give my interpretation of the rights of the parties under that contract. And that's, that's why this

procedure was bifurcated.

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Where we are at this point is, you've made an offer regarding buying out the property based upon the Court's interpretation of the contract.

Mr. Moll has made a counteroffer.

My druthers, if I'd had my druthers, inasmuch as the difference between your offer and his offer is less than $5,000, that if you accept his offer, the property is purchased based upon his offer; and the only issue, if it is, if it be an issue, deals with the Court's interpretation of the contract.

MR. WATSON: Judge, may I respectfully say I don't think that expresses where we are. That's part of the problem.

I've asked you to clarify. We have tried dutifully to settle this every stage along the way.

THE COURT: Okay.

MR. WATSON: My notes show this is where the problem arises that when you talked and gave us your ruling, which I think is a Statement of Decision, that after you got through, you thought that she should have the option to buy.

My notes show we were to take the incumbrances as of 1989, but allow interest. That's what my notes show.

What that meant, or what you thought, I don't know.

My client interpreted that to mean, He would get interest at 12 and a half percent as provided in the agreement. And amount of that interest would be $24,737.

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And that she would in effect get credit for the payments reduction in principal because you said, Take the mortgage as of '89.

She elected not to do that. And they came to us and said, She is not going to buy him out.

And we tried dutifully to pin them down as to what they wanted the other day.

If you'll recall at the end of the day in chambers they still

wouldn't come up with something as of yesterday. Mr. Moll wasn't able to come up with anything. He wasn't able to reach an agreement with her.

Now, all my client wants to know is if, if you will rule on the question, what you meant.

He doesn't feel, if he was going to get interest if she bought him out, he should lose that interest if he now buys her out.

We can agree on what the numbers are, the difference between the numbers, if he doesn't get any interest, it's clear. The difference is $5,378.90.

What would happen is, if you take the figure of the mortgage as of 1989, then there's an equity of -- (indicating) Then you have interest reduction of the ninety-one thousand, five twenty-three that's still left. So that the parties would get ninety-six thousand, seven thirty-eight.

If you take it as of the earlier time the difference is 91,000. You add to that the ten thousand seven fifty-seven, and what she wants is hundred two

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thousand one seventeen. And the difference is exactly $5,378.98. We're not going to be here wasting the Court's time for that.

But what Mr. Threikel says is, What did you mean when you said that take the incumbrance as of 1989 but allow him interest? He doesn't feel it's appropriate for her to get the reduction from 1989 till now, he gets no interest also.

He wants it over with and we'll resolve it, but how does he lose the interest, in your mind's eye, is all we're asking you to tell us?

THE COURT: Okay.

Mr. Moll.

MR. MOLL: Just very briefly though.

You know, if in -- if in effect now he's buying us out, under the contract we would be entitled to that interest.

Because we're the ones now who are selling.

And, you know, I think what we're saying we're trying to reach a bargain. And this was the bargain that we had proposed. It's okay. It's very hard for us to say, Okay, we want a worse part, this was a bargain.

I agree, I don't think it's worth wasting everyone's time coming back and again and again over $5,000; but I think in the context of this whole litigation that 5,000 should be in favor of my client. And I'll leave it at that.

THE COURT: Okay.

Go ahead, Mr. Watson. Can't deny you the last

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word. I see you're taking a breath.

MR. WATSON: No, the alternate the other day you could order the house sold. If you did that, we still need the same ground rules if you order the house sold which was within the prayer; then it was my understanding from what you said, he would be entitled to interest during this interim period.

If that's not what I heard, or I took the notes down wrong.

THE COURT: My sense was that I was, I was somewhat encouraged by the fact that I thought Mrs. Hamann would buy the house. And I believe that was the assumption that I was making. She has put a great deal of time and effort into this house and if one thing she can at least get the pride of ownership of that she, herself, has built.

When she indicated she wasn't going to buy the house, that's a little bit different from what the Court anticipated was going to happen.

And I think Mr. Moll is right, that the interest went one way, it doesn't -- it goes to either the buyer or the seller. But based upon, based upon my assumption that she would be buying out, then the interest would be going to him. Isn't that the way the contract is written?

And if he's the buyer, that interest is not the same because the contract does not anticipate that once the offer is

made that it's not going to be accepted.

So I think we really are in a situation here: Yes, I can go through and attempt to calculate the damages.

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You have indicated what we've wanted for all along was for them to take a position. They've now taken a position.

MR. WATSON: All right. Let me have 10 seconds.

THE COURT: Okay.

MR. WATSON: It's over with.

THE COURT: Okay. Accepted then?

MR. MOLL: Okay.

And just, you know, the only thing to clarify is that we do have the mortgage statements so they're a few dollars off, I don't know if we need to do that on the record, but the interest right now as of the last statement we received was ninety-three two forty-five seventy-five.

MR. WATSON: Well, whatever.

MR. MOLL: Principal, that's the principal. I mean, whatever it is.

MR. WATSON: Whatever it is it is.

THE COURT: Okay, all right.

MR. MOLL: May we have the 90 days? Is that acceptable? Just give us a chance to find a new place.

MR. WATSON: Yes, 90 days. Let's pick the date, Judge.

THE COURT: 90 days from today's date.

MR. MOLL: We would assume the Court would continue jurisdiction.

MR. WATSON: May 7th, that looks like a Tuesday.

THE COURT: Is that right?

MR. MOLL: I'm sure that's fine.

THE COURT: Okay. 13 weeks is May the 9th,

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that's 91 days; is that right? So the 8th, May 8th.

MR. WATSON: May 8th. And the property will be maintained in a reasonable, the same condition, reasonable

wear and tear; accepted?

MR . MOLL: No problem with that.

THE COURT: Okay.

And insurance will be maintained.

MR. WATSON: Insurance will be maintained.

MR. MOLL: Yes. And as we discussed taxes, well, I guess taxes and insurance will be prorated to the day of closing.

MR. WATSON: Taxes and insurance prorated to the day of closing.

THE COURT: Okay.

MR. MOLL: All right.

We had talked about this, Mr. Watson, just for the record, may we indicate that the parties stipulated that the property is taken out of joint tendency is now held as tenants in common?

MR . WATSON : Yeah, I brought this up to him the other day. We forgot to on the record. I don't think it's a good crap shoot to go joint tenants.

THE COURT: All right. Now, tenancy in common.

MR. WATSON: By stipulation, to be deemed tenants in common.

THE COURT: Okay.

MR. WATSON: Do you want a stipulation? I deem

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we have resolved this, we're not going to have any appeals, that this is over with, in effect this is a stipulation to be bound, guided by your interpretation?

THE COURT: I don't -- I don't know that that's necessarily so.

I know that I made a ruling on it. I know there were objections to the ruling.

Right at this point, Mr. Moll asked me this morning, If we agree on the sale price are we waiving any rights to appeal? And my sense is they aren't.

What we are agreeing upon is how the house is going to

be disposed of now.

MR. WATSON: Okay. Then I would like to -- if that's the case, I would like to get some kind of a judgment prepared so the appeal time runs during the 90 days if they're still thinking about --

THE COURT: Okay.

MR. WATSON: -- appeal.

THE COURT: All right.

Acceptable?

MR. MOLL: It's acceptable.

And certainly we would stipulate that would only be on the issue of the labor, if that's what counsel would like.

THE COURT: All right.

THE COURT: Anything further we need to put on the record then?

MR. WATSON: Shall I prepare a judgment?

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THE COURT: I think it would be best if you prepare the judgment. I think you're anxious to have the time begin running, and once the judgment is prepared then we can see where we are.

MR. MOLL: Thank you.

THE COURT: Thank you.

MR. MOLL: Thank your staff for staying over.

MR. WATSON: Thank you, your Honor.

TESTIMONY OF LABOR AGREEMENT

Citations are to the the first volume of the reporter's transcript.

Evidence of "Equal" Labor Agreement

Deposition of Respondent:

"Q. What was your understanding as to the amount of work each of you would do?
A. There wasn't an understanding.
Q. Well, were you willing to undertake the work all on your own and have Charlotte do a little bit of it?
A. No.
Q. And would you have wanted her to take on all of the work and you just do a little bit of it?
A. No.
Q. Would you say your general understanding was that the amount of work you would do would be relatively equal?
A. Over time, yes.
Q. Did you discuss that?
A. Yes.
. . . .
Q. Okay, when were these discussions taking place?
A. They went on all the time.
Q. You're saying continually through your relationship?
A. Yes.
Q. And you discussed who was doing more work and who was doing less work?
A. Yes." Deposition of Respondent (Vol I) 26:6-27:7.

Cross examination of Respondent:

"Q. Did you discuss who's going to be doing the work?
A. In general terms, yes.
Q. And what was that discussion?
A. Well, we wanted to do it. We talked about whether

we should have other people do it, if we should contract out certain parts, how much of it we wanted to do ourselves. And we talked about it and we wanted to do most of it ourselves.

Q. Did you feel that you were going to work on it together and basically split the work down the middle?

A. Over time, yes.

Q. Was that actually discussed or was it sort of implicit given your entire agreement to that date that everything be split down the middle?

A. Well, I mean, it was discussed to the point where, where we realized that over time. And what happened was, is that when we signed this agreement, I believe both of us were working. No, that's not true. We weren't. But what we realized is that in the immediate terms Charlotte would probably do more than me. And that over time we'd equalize that out.

Q. Okay. But the intention then was that over time things be equaled out; is that correct?

A. Yes.

Q. And you really didn't talk, in writing this agreement or in signing it, about what would happen if one of you did significantly more work than the other, did you?

A. No, we had expected each to do about the same amount of work." R.T.(A) 38:4-39:4.

Direct examination of Petitioner:

"Q. Now, you've testified that you began working more and more on the house and Mr. Threikel was working less and less. Did you have discussions with Mr. Threikel about being reimbursed for, for the unequal amount of labor that you felt you were putting into the house?

A. Yes I did.

. . .

Q. And when did those discussions start, first start taking place?

A. I believe the first discussion I had with Rick was

around the time when we signed our Property Agreement.
Q. What was that -- the nature of that discussion?
A. I said to Rick that, you know, I said, "I've done a lot more work here, I think. And what are we going to do about that? Maybe we should do something about this agreement."
And he said, "No." He said, "We've agreed to work equally on the house and I, you know, I really think that I'm going to make up the difference in the next few months when I begin working on the front porch railing, the front porch trellis. I'm planning to do the gutter work. So when he told me, when he said that, those things to me, it did make sense to mte that the work would equal out."
R.T.(A) 133:16-134:21.

Direct examination of Petitioner:

"Q: Was there anticipation at that point, however, that he would basically do an equal amount of work in the future to even it out?
A: Oh yes, I expected that. And there were some jobs that we saw coming up immediately that I know he planned to do himself." R.T.(A) 120: 1-6.

Evidence of "Equal" Labor Agreement and Rejected "Real Property for Labor" Agreement

Direct examination of Respondent:

"Q. Did you and she specifically consider at the time the agreement - - Property Agreement was signed payment, possible payment of fair market value the labor of either of you?
A. Yes, we considered it. There is one of the examples in the book discusses a labor agreement. And we decided that that wasn't appropriate since we'd be working on the house together.
Q. The example, a draft or a suggested draft of the agreement at page 143 refers to the possibility of labor

with a valuation of the labor; does it not?
A. Yes.
Q. And did - - you and she specifically decided that you would not have such a provision in your agreement; is that correct?
A. Yes." R.T.(A) 15:22-16:9.

Cross examination of Respondent:

"Q. And you indicated that there was an agreement, I believe, on page 142 of the Living Together Agreement Kit-
A. Yes.
Q. --between Jenny Parker and Joe Richards. Under that scenario it is assumed that Joe is a professional carpenter; is that correct? I'm looking on the first paragraph of page 142.
A. I don't remember.
Q. Okay. It says, "In addition, let's assume that the house is an older one in need of lots of repair and that Joe is a professional carpenter."
A. Oh, you mean at the top of the page?
Q. Yes. The next to the last sentence in the first paragraph.
A. Okay.
Q. Okay. And, furthermore, this was a situation really where one person invested more money in the house than the other and this was a certain way to balance unequal contributions; was it not?
A. In this example, yes.
Q. You put exactly the same amounts in the down payment; did you not?
A. Yes." R.T.(A) 99:18-100:13.

Cross examination of Petitioner:

Q. When you entered into the agreement, which is Exhibit 1, you did at that time notice the provisions on page 143 of the Exhibit 2 relating to compensation for

labor; did you not?
A. I remember seeing this in the -- well, I think I remember seeing this in the Spring of 1981.
Q. Right. And the reason there was both intended to work on this house and it was treated as a fixer-upper house; is that not true?
A. Well, we knew it was a fixer-upper, you bet.
Q. And you never intended to compensate one another at the time of entering in to the agreement for labor; is that correct, at the time of the entering of the agreement.
A. Well, I don't think that's true.
Q. Did you at the time you entered the agreement intend to compensate one another for your labor?
A. At the time - - are - - well, let's talk about - - are we talking about when we signed it or when we wrote it up?
Q. Any time up until the day it was signed.
A. Okay. At the time that we wrote this agreement, neither one of us contemplated doing a lot of work. And more importantly we expected that if any work was done on the house that we would do an equal amount of work.
Q. Okay. And you, therefore, that is, No, even though you saw provisions for compensating one for labor in the form of agreement, you did not put such a provision in the agreement, did you?
A. That provision is not in the agreement primarily because it does not apply to us. Directly opposite on page 142 it specifically says that Joe is a professional carpenter. Neither one of us are professional craftsmen at that time." R.T.(A) 174:9-175:21.

<u>Evidence of "Equal" Labor Agreement and of Meaning of "Cost of Repairs and Improvements" in Clause 3</u>

Direct examination of Respondent:
"Q. Were there every any discussions before the agreement was entered into about the term "improvements" consisting of your or her labor?

A. No, we interpreted the cost of improvements to mean out-of-pocket expense." R.T.(A) 192: 18-22.

Cross examination of Respondent:

"Q. You say we interpreted cost of improvements to be out-of-pocket expense. Did you have that discussion at the time you wrote the agreement.

A. Yes.

Q. And you're testifying that at the time you wrote the agreement you said, "What did we mean by cost of improvements?" and you said, "Oh, this is only out-of-pocket expenses." Is that the nature of the discussion you had?

A. Excuse me, could you ask me again?

Q. Are you testifying that you talked to each other about, "What do we mean about when we say cost of improvements?" "Oh, this will only be out-of-pocket expenses." Is that what you're saying your discussion was about at that time?

A. Yes. I may not have discussed it in those words, but we were talking about money we would spend.

. . .

Q. And you really didn't consider the issue of your labor in writing this agreement, did you?

A. What - - could I see my deposition, please?

MR. WATSON: I was just going to suggest to the Court the very next answer says that the did think about the labor and it was discussed. And he stopped on page 32, your Honor.

. . .

Q. On line 4, "Well, it's left out probably on purpose." That's his response. I'll go back. My question is:

'So you're saying it wasn't something that was considered in paragraph 3; is that correct?

ANSWER: Well, it's left out probably on purpose.

QUESTION: All right. Well, let's talk about that. Did you discuss that at the time that you wrote - - did

you discuss that at the time you wrote paragraph 3?
ANSWER: I think so.
[QUESTION:] Can you remember those discussions?
ANSWER: They were basically that we work on the house together.
QUESTION: Okay. That was the intention that you would work on the house together equally?
ANSWER: Yeah, there would be give and take by both,
[QUESTION:] Relatively equally?
ANSWER: Yeah.
QUESTION: Relatively equally?
ANSWER: Yeah.' "
QUESTION: As you're sitting there now, would you say that you've work on the house relatively equally? And again, we're talking about improvements to the house?
ANSWER: Well, I think overall from start to finish I would say, no.

Q. Then I think you go on to say you did 60 percent -- we could read the whole deposition, but does that cover what you were going to say, Mr. Threikel?
A. What I wanted to comment on , it's been so long now since you asked me the question I've sort of forgotten. Maybe you should ask me again.
Q. Okay. My question to you is, Is it not a fact that you really didn't discuss the compensating one another for an unequal amount of labor at the time you wrote this agreement?
A. Okay. Now, in making my answer I will presume that you're - -you're asking me this question because of my answer where I said that wasn't a consideration of how things were split in paragraph 3.
Q. That's correct.
A. What I meant by that wasn't a consideration in terms of paragraph 3. Was that that paragraph - - let me say

this carefully, I think the answer to that is in the next few questions and answers where I said, "Well, it's left out probably on purpose." It was discussed and we had decided that we would be splitting the labor relatively equally so there would be no labor in the way we figured, you know, if - - if we were going to pay one another for labor." R.T.(A) 193:3-198:18.

Cross examination of Petitioner:

"THE COURT: And in your mind when you put paragraph 3 which says, "Costs of repairs and improvements" --
THE WITNESS: Yes.
THE COURT: --does part of the definition of "improvements" include the value of your labor?
THE WITNESS: Yes it does. There is no improvement if you only have materials. You can buy all the materials you want and unless someone takes -- uses her or his labor, there's no improvements.
BY MR. WATSON:
Q. When did you decide the words "improved", "costs of improvements" included your labor?
A. Well, it just makes sense. I can't tell you when I decided that. I - - it makes sense to me.
Q. When did it makes sense to you for the first time?
A. Well, I would say that it made sense to me when we wrote this agreement that the cost of an improvement would, of course, include labor costs.
Q. For your own personal labor now I mean, not the labor of an outside third person, but would include your labor and Mr. Threikel's labor?
A. I didn't think that hard about it.
Q. In fact, that 's not what you intended by the agreement, is it?
A. Well, the intent of the agreement was to - - deal fairly with each other. The intent of the agreement was to split costs fairly between us, equally between us. And that

was definitely our intent. I think it was Rick's intent, it was certainly my intent." R.T.(A) 177:24-178: 3–23.

Conflicting Evidence of Subsequent "Cash for Labor" Agreement

Cross examination of Respondent:

Q. Now, after Ms. Hamann came back in you said September of '86, I believe?

A. I think it was almost fall. She had a family reunion or something in North Dakota, didn't get back until late summer.

Q. She wasn't employed immediately, was she?

A. No.

Q. In fact, during that period she worked on the house, didn't she?

A. A little.

Q. During that period she indicated to you that she had done much more work on the house than you did and wanted to be paid for her work; did she not?

A. Yes, or words to that effect.

Q. And your response, was it not, to the effect that the work wasn't completed yet and it couldn't be valued so how could we split it up; is that correct?

A. No, that's not correct.

Q. What was your response to that?

A. My response is, "What about the work that I did?" And she said, "What have you done? You haven't done anything."

Q. This discussion took place a number of times then after she returned; did it not?

A. Yes." R.T.(A) 86:24-87:20.

Direct examination of Petitioner:

"Q. Okay. Now in -- when was the next time then that the issue of this disproportionate amount of labor came up?

A. It came up in July, 1987.

. . .

A. I said, "What about this work? I really need to be paid for this."
And he said, "Well, the first thing is it's not finished."
And then that's - - he walked me into the family room area, and it's true, that room was nowhere near finished. The hardwood flooring wasn't in. The plaster was still pretty much of a wreck. There was no molding. The new doors, at least one of the new doors had not been put in. There was a lot of work that needed to be done there.
I said "Well, you're right, it's not done." And the half bath wasn't done. So I said, "Well, okay." From our discussion it was my understanding at that point when it was completed that then we would bring in a contractor [to estimate the value of my work]." R.T.(A) 137:16-139:4.

Redirect examination of Respondent:

"Q. You've heard Ms. Hamann's testimony about the discussions starting in the late -- middle 1980's relating to her desire to compensated for her labor and your indication that the work needed to be finished. Is that the way those discussions took place?
A: No. The way the discussions took place was, is that we could never reach a significant agreement about labor because she would refuse to acknowledge that I had done very much at all on the house. And so it seemed like there was a bad faith on her part in terms of what I had done on the house." R.T.(A) 192: 7-17.

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B. WHAT THE MARVIN CASE DECIDED

[Marvin v. Marvin 18 Cal.3d 660 (1976)]

The Supreme Court begins their opinion with the conclusion and so will we.

"We conclude: (1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision. (2) The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. (3) In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an

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*implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case."**

Yes, this is about as easy to understand as Sanskrit. But if we look at their conclusion, part by part, perhaps we can decipher what the Court is getting at. Hand in there -- this is important.

1. Unmarried Couples Are Not Covered By Rules That Affect The Married

The first part of this decision is a recognition of a legal conflict which has arisen over the past 15 years due to the substantial increase in the number of couples living together without marrying. The legal controversy occurred when one partner died or the couple separated and a court had to decide how the property acquired during the relationship was to be divided. Some courts said that when a nonmarital relationship looked enough like a married one, the Family Law Act of California required an equal division of the property according to community property principles. That is, if the unmarried couple used the same last name and acted as if they were married, they would be treated as if they were by the courts. The part of the Marvin decision marked (1) expressly rejects this interpretation. The California Supreme Court is saying that you are either married or

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* In another part of the decision the California Supreme Court specifically state that they were not deciding the question of whether a party to a non-marital relationship is entitled to support payments and that this question would be decided in a future case. However, to add confusion to an already mixed-up set of circumstances, Michelle's award of $104,000 in the subsequent trial court decision for "rehabilitation purposes" sounds an awful lot like a lump-sum alimony payment. See section D below.

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you are not, and that it is not up to the courts to pretend you are if in fact you have not met the marriage requirements. However, as we shall see, even though the Court does not allow unmarried couples an equal division of property under the community property laws, the same result (an equal division of the accumulated property) can be reached under

the *Marvin* decision using other theories.

2. Unmarried Couples May Contract

The part of the decision marked (2) states simply that unmarried couples may make "express" contracts between themselves concerning their property. Express contracts can be written or oral, but they do require the direct words of the parties and are different from the contracts implied from the circumstances of the relationship which we discuss in the next section. Elsewhere in their opinion the justices indulge in a brief historical discussion of previous decisions concerning contracts and the "meretricious couple" (that wonderfully legal term describing people who shack up). In the past, the California Supreme Court had invalidated many contracts because of the "immoral" character of the relationship. Instead of admitting directly that its previous decisions didn't make much sense, the Court stated that they "hovered over the issue in the somewhat wispy form of the figures of a Chagall painting". They then proceeded to reverse the old cases and state the following simple rule:

> *The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation and continuation of a nonmarital relationship when they entered into it. Agreements*
>
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>
> *between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services." ...Adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights...They may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely, they may agree that each partner's earnings and the property*

acquired from those earnings remain the separate property of the earning partner (a great variety of other arrangements are possible, see Chapter 4). *So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose and no policy precludes the courts from enforcing such agreements."*

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D. CONTRACTS BETWEEN UNMARRIED PEOPLE BUYING HOUSES

It is all very well to list the various common ways of taking title to a house. But how does listing yourself as "tenants in common", or "joint tenants" answer such questions as "who gets to keep the house if we split," or "what do we do if one of us puts in twice as much for the down payment as the other," or "what happens if one of us already owns a house and the other wants to move in and share ownership?" The answer to these questions is that you need to make a written understanding (a contract).

NOTE FOR PEOPLE WHO HATE CONTRACTS:
Many people will prefer not to make a contract but rather to fly by the seat of their pants, sure that their love and respect for each other will insure a soft landing. As we discussed in Chapters 3 and 4, this can be dangerous. Where valuable pieces of property such as houses are involved, it is particularly necessary to write something down. If you do split up and you mutually agree to a solution different than the one in your written contract, fine. You

---

**There are inheritance tax consequences associated with different kinds of ownership. This book does not deal with these tax problems as they are not of major significance to people of average income. If you are very wealthy or are buying property with a high value, you would be wise to

discuss these problems with a tax attorney or an accountant

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can tear up the old contract and get on with the new. However, if your relationship ends with more of a bump than you guessed, and you find it hard to communicate, you will still have your written understanding to fall back on.

A house contract can be simple. After reading this section, you may conclude that you can prepare it yourself, either as part of a comprehensive living together contract or as a separate agreement. However, houses are major investments and you don't want to make an agreement that either doesn't solve all your problems or makes them worse. So if your agreement is complicated, you will be wise to have it checked by someone who is familiar with the legal problems encountered by unmarried couples. This doesn't mean that you should take a full wallet and a vague basketful of problems to a lawyer. It does mean that you should do as much work as possible yourself and only use the lawyer to help you with particular problem areas. (see Chapter 13). Unmarried couples who are jointly buying a house will usually find that the things they want to write down as part of a contract fall into the following subject areas (to make this easier to understand, let's resurrect Felix and Keija):

1. *Who keeps the house if Felix and Keija split up and both want it?*
2. *How do Felix and Keija decide the value of the house if they split up?*
3. *Assuming that Felix and Keija split up and a decision is reached that one of them will keep the house and buy the other out, how is the transfer accomplished?*
4. *If one person invests more money in the house than the other, how can the unequal shares be reflected in a contract?*
5. *If one person moves into a house already owned by the other, what legal steps can be taken to protect both*

parties?

We can't give you answers to every possible
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variation on all of these subject areas, but we hope at least to give you a structure for thinking about your situation and for dealing with a lawyer if necessary. Before we examine each of these five questions, let's first set out a simple sample contract to give you an idea of what you are aiming at. Under Parts 4 and 5 of this section we will discuss several more complicated agreements.

SAMPLE HOUSE PURCHASE CONTRACT

Keija Adams and Felix Finnegan agree as follows:

1. That they will purchase the house at 1400 Beverly St., San Jose, California for $65,000 and will take title to the home as tenants in common.
2. That Keija and Felix will contribute $10,000 each to the down payment and will each pay one-half of monthly mortgage and insurance costs.
3. Keija and Felix will each be responsible to pay one-half of all property taxes and one-half of any costs for needed repairs.
4. In the event that Keija and Felix decide to separate and both want to keep the house, a friend shall be asked to flip a coin within 30 days of the decision to separate. The winner gets to purchase the house from the loser provided that he(she) pays the loser the fair market value (see paragraph 5) of his or her share within 90 days. When payment is made, the house shall be deeded to the person retaining it.
5. The fair market value of the house shall be determined at any time by either the written agreement of Keija or Felix, or, if this is impossible, by appraisal. The appraisal shall be carried out as follows: Keija and Felix shall each

designate one licensed real estate broker or salesperson who is familiar with the neighborhood where the house is located to make an appraisal. The two appraisers so designated shall jointly agree on a third licensed real estate broker or salesperson to make a third appraisal. The three appraisals shall be averaged to arrive

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at the fair market value of the house. The fees of the three appraisers shall be paid in equal shares by Keija and Felix.

_____	_____
Date	Date
_____	_____
Keija Adams	Felix Finnegan

Now let's look at variations. This material isn't difficult, but you will want to read it through several times to be sure that you understand it completely.

1. Who Keeps The House If Felix And Keija Split Up?

Let's assume now that Keija and Felix have been living together for three years prior to the time that they decide to buy their house. In the year prior to the house purchase there has been some tension between them -- Keija thinks that Felix should be less promiscuous, and Felix gets furious because Keija never cleans the kitchen and squeezes the toothpaste from the wrong end. Both have agreed to work out these problems and plan to continue living together for the indefinite future, but there are just enough clouds on the horizon for both to realize that staying together "until death do us part" is not inevitable. While they are communicating well, both want to write something down so that if they do break up, there will not be a lot of paranoia about who gets the house.

Here are the most common types of contract clauses that would solve this problem. Keija and Felix will have to decide which best suits their circumstances.

a) "In the event that the couple (or one of them) decide(s) to separate, Felix shall keep the house and pay Keija the fair market value of her share within sixty days of the decision to separate." (Of course, this agreement

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can be reversed by reversing the names.)

or

b) "In the event that the couple (or one of them) decides to separate, the house shall be listed for sale within thirty days of this decision, and the proceeds of the sale equally divided after all costs of sale and mortgage debts are paid."

or

c) "In the event that the couple (or one of them) decides to separate and both want to keep the house, a friend shall be asked to flip a coin within thirty days of the decision to separate. The winner gets to purchase the house from the loser provided that he (she) pays the loser the fair market value of his or her share within ninety days of moving out."

or

d) "In the event that the couple (or one of them) decides to separate and both want to purchase the share of the other, they shall jointly agree in writing on a third person to act as an arbitrator to decide who shall be entitled to purchase the house from the other. The arbitrator shall meet with both Felix and Keija and give each a chance to have his or her say. The arbitrator shall take the following factors into consideration in arriving at a decision as to who needs the house more:

1) Proximity of the house to Keija and Felix's respective places of employment.

2) The needs of any minor children of the parties.

3) The respective abilities of the parties to find another place to live.

4) (Whatever else you wish to include)"

or

e) "In the event that Felix and Keija (or one of them) decide(s) to separate at a time when one of them has physical custody of minor children, the person with physical custody of the children shall have the first choice

to stay in the house. The person staying in the house shall pay the other the fair market value of his or her share within ninety days of separation."

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2. How Do Felix and Keija Decide The Value of The House If They Split Up?

When people split up, they often believe that legally they must sever all ties between one another. While at times this may be emotionally desirable, it is not legally required. Keija and Felix may legally continue to own their house or other real property together as long as they wish to, even if they split up fifteen minutes after the house is purchased. However, it is common to find that when people separate and a decision is made for one to stay in the house and the other to leave, the person leaving wishes his or her share of the equity in cash. Sometimes it is possible for the person staying in the home to pay immediately, sometimes not. But before you reach this question, you must determine the value of the house. Here is a contract provision that takes care of this simply and fairly:

a) "If Felix and Keija (or one of them) decide(s) to end the relationship and to divide the equity in the house, the value of the home shall be determined as follows:

1) By mutual written agreement at any time;

2) Or, if agreement is not possible, by appraisal. The appraisal shall be carried out as follows: Keija and Felix shall each designate one licensed real estate broker or salesperson who is familiar with the neighborhood where the house is located to make an appraisal. The two appraisers shall jointly choose a third licensed real estate broker or salesperson to make a third appraisal. The three appraisals shall be averaged to arrive at the fair market value of the house. The fees of the three appraisers shall be paid in equal shares by Keija and Felix."

3. Assuming That Felix And Keija Split Up And A Decision Is Reached That One Of Them Will Keep The House And Buy The Other Out, How Is The Transfer Accomplished?

Here are some alternatives:

a) "Within ninety days after Felix and Keija decide to separate, the person staying in the house shall pay to the

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*person leaving this or her share of the equity at which time the person leaving shall deed his or her share of the house to the person staying."**

b) "Within ninety days after Keija and Felix (or one of them) decide(s) to separate, the person remaining in the house shall pay to the person leaving one-half (one-third or one-fourth or whatever works for you) of his or her share of the equity. The person staying in the house shall also give the person leaving a second mortgage (or deed of trust) for the remainder of his or her share. The mortgage (deed of trust) shall be for a term of five years (three, six or whatever works for you) and shall be payable in equal monthly installments. This mortgage (deed of trust) shall be recorded at the County Recorder's office."

NOTE FOR PARENTS: If the person staying in the house is going to be primarily responsible for the care of the couple's children, it may be particularly difficult for him or her to raise cash to pay the other off for the house. In this situation it may be wise to establish the value of the respective interests in the house at the time of separation, but not require the person staying (the parent with custody) to pay the other until the children reach the age of majority, or the family moves or the house is sold. This can be done by the person leaving deeding the house to the parent with custody in exchange for a mortgage which doesn't fall due until the appropriate time in the future.

4. If One Person Invests More Money In The House Than The Other, How Can The Unequal Shares Be Reflected In A Contract?

---

*Before you know what the equity is you must agree on the fair market value of the home. This is where the appraisal comes in. Once you know the fair market value, you subtract the amount of the mortgages (or deeds of trust) to arrive at the equity. Sometimes it is easier to raise cash on houses than you would first imagine. A financial institution may agree to a new mortgage for a larger amount in the name of the person staying, thereby providing enough money to buy the other person out.

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It is common that one person has more money to invest than the other. Suppose, for example, that Jeannie has just inherited $20,000 and can make the entire down payment, while Joe either has no money or only a small amount for the down payment, but does have a steady job and can pay his share (or more than his share) of the monthly payments. In addition, let's assume that the house is an older one in need of lots of repairs and that Joe is a professional carpenter. Here are some ways that this situation could be handled:

a) Jeannie could buy the house as the sole owner and Joe could pay a monthly amount as rent (more about this below under Section D5 of this chapter);

or

b) Jeannie could make a gift of one-half of the down payment to Joe. In this case title could be taken under "joint tenancy" or "tenancy in common." See Section C of this chapter for definitions of these terms.

or

c) (This one–or a variation–seems to fit most people's psychological and practical needs.) Jeannie and Joe can take title to the house as "tenants in common" and at the same time can sign a separate contract which makes it clear that they own the house in proportion to the dollar amounts that each has contributed. The contract is then recorded at the County Recorder's office in the county where the property is located. Here is a detailed example of how this sort of agreement might read. Of course, the specifics of your agreement will

differ. When houses are owned in unequal shares, title should be taken as "tenants in common".

AGREEMENT

Jeannie Parker and Joe Richards agree as follows:

1) That Jeannie and Joe will purchase the house at 1639 Carolina St., Salem, Oregon. Their initial investment (down payment and closing costs) will be $20,000, of

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which Jeannie will contribute $18,000 and Joe, $2,000. Title to the house will be recorded as "Jeannie Parker and Joe Richards and Tenants in Common."

2) Joe and Jeannie will each make one-half of the monthly mortgage, tax and homeowners insurance payments.

3) Joe will contribute labor and materials to improve the house. His labor will be valued at $12.00 per hour and the materials will be valued at their actual cost.

4) A notebook entitled "Exhibit A - 'Homeowners Record' for 1639 Carolina Street" will be maintained and is hereby incorporated into, and made part of, this contract as Exhibit A. Joe and Jeannie shall record the following information in their "Homeowners Record".

a) The $18,000 initial contribution made to purchase the house by Jeannie;

b) The $2,000 initial contribution made to purchase the house by Joe;

c) All money Jeannie contributes for house payments, real property taxes and homeowners insurance;

d) Joe's labor on home improvements valued at $12.00 per hour;

e) The dollar amount that Joe pays for supplies and materials necessary for home improvements;

f) All the money that Joe contributes for house payments, real property taxes and homeowners insurance.

5) The proportion of the house owned by Jeannie and Joe respectively as of any particular date shall be computed as follows:

a) The total dollar amount of the contributions by

---

*The system we set out here is simple and reasonably fair. It credits both parties with all contributions made (not only those which go to equity). It allocates any natural increase in the value of the home along the lines of total contribution and ignores the fact that Jeannie made a large portion of her contribution before Joe. If you want to work out a more exactly accurate (and complicated) system, see a computer. Several of our friends are using this sort of system and find that it works well.

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both Joe and Jeannie as set out in paragraph 4 shall be separately totaled;

b) The total equity interest in the house shall be computed by subtracting the amount of all mortgages and encumbrances from the fair market value of the house as of the date the computation is made. If Keija and Felix can't agree on the fair market value, they shall have the house appraised. This shall be done by each of them designating a licensed real estate broker or salesperson who is familiar with the neighborhood to do an appraisal. These two appraisers shall choose a third real estate salesperson or broker who shall also make an appraisal. The average of the three appraisals will be the fair market value of the house;

c) The smaller total arrived at in Section 5a of this contract shall be placed above the total amount invested by both people to form a fraction. This fraction represents the share of the total joint equity interest in the house owned by the person with the smaller share. The remainder of the total joint equity interest belongs to the person with the larger share.

EXAMPLE: *If after living together for five years, Joe's contribution totals $20,000 and Jeannie's $40,000, Joe would be entitled to 20,000/60,000 or 1/3 of the value of the total equity in the house. Assuming that the fair market value of the house was $80,000 and all mortgages and other encumbrances total $40,000, this would mean that Joe would be entitled to 1/3 of $40,000 or $13,333.*

6) Either Joe or Jeannie can terminate this agreement at any time. If this occurs, it is understood that the person with

the larger equity interest in the house as computed under the terms of paragraph 5 above shall have first choice as to whether he or she wishes to stay living in the house.

7) Should separation occur and a decision made under the terms of paragraph 6 of this contract concerning who is to stay in the house, the person leaving is entitled to receive at least one-half of his or her share as computed under paragraph 5 of this contract in cash within ninety

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days of the decision to separate. In addition, the person staying shall give the person leaving a three-year mortgage for the remaining portion of his or her share not paid in cash. Said mortgage will be recorded at the County Recorder's office and is payable in 36 equal monthly installments at 9% interest. If the person who wishes to stay in the house is unable to meet the terms of this paragraph, the house shall be sold and the proceeds divided according to the shares established under paragraph 5a of this contract.

_____ _____

Date Joe Richards

_____ _____

Date Jeannie Parker

PROPERTY AGREEMENT

Charlotte A. Hamann and Richard S. Threlkel agree as follows:

1. That we will purchase the house at 834 Balra, El Cerrito, CA., and we will take title to the home as joint tenants.
2. That we will contribute equally to the downpayment, all closing costs, monthly mortgage payments, and insurance.
3. That we will each be responsible to pay one half of all property taxes and costs of repairs and improvements, except as noted in record book.
4. In the event that we decide to separate, the person remaining in the house shall pay to the person leaving his or her share of the equity as specified in article 5, within the time and terms specified in article 6. If both want to keep the house, a friend shall be asked to flip a coin within 30 days of the decision to separate. The winner can then purchase the house from the loser under the terms specified in 5 and 6.
5. Equity is defined as the difference between the fair market value and any encumbrances on the house. The fair market value of the house shall be determined at any time by either the written agreement of Charlotte and Richard, or if this is impossible, by appraisal. The appraisal shall be arrived at as follows: each shall designate one licensed real estate broker or salesperson who is familiar with the neighborhood where the house is located to make an appraisal. The two appraisers shall jointly agree upon a third licensed real estate broker or salesperson to make a third appraisal. The fair market value of the house is the average of the three appraisals.

6. Within 90 days after we (or one of us) decides to separate, the person remaining in the house shall pay the person leaving one-third of his or her share of the equity. The person leaving shall give the person staying in the house a non-transferable second mortgage for the remainder of his or her share at 12-1/2% per annum, amortized over five years and which will be payable in equal monthly installments. This mortgage shall be recorded at the County Recorder's office and title shall be transferred to the person remaining in the house at that time.

[-2-]

7. The property must be sold if neither person wants to remain in the house or if neither person can meet the terms of 5 and 6.
8. Neither of us may take a loan against the house without the written approval of the other.

Signed: _____ Date: 11-27-82
Signed: _____ Date: 11-27-82

STATE OF CALIFORNIA, County of ALAMEDA,
On this 27th day of November, in the year one thousand nine hundred and _____ before me, MORRIS A. JOHNSON, a Notary Public, State of California, duly commissioned and sworn, personally appeared CHARLOTTE A. HAMANN & RICHARD S. THRELKEL known to me to be the_____ and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same_____
IN WITNESS WHEREOF I have hereunto set my hand and offered my official seal in the Alameda County of California the day and year in this certificate first above written.

_____
Notary Public, State of California
My Commission Expires June 3, 1983.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

RICHARD S. THRELKEL Plaintiff, Cross-Defendant and Respondent, v. CHARLOTTE A. HAMANN Defendant, Cross-Complainant and Appellant	Civil No. AO 54468 Contra Costa County Superior Court No. C089 03498

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of California,
County of Contra Costa
Honorable Richard S. Flier, Judge

CHARLOTTE HAMANN
P.O. Box 1096
El Cerrito, CA 94530
In Propria Persona

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E. All Courts Are Required to Judicially Notice the Rules of Professional Conduct

All California courts must take judicial notice of the decisional and statutory law of this state and the rules of professional conduct for members of the state bar adopted pursuant to Business and Professions Code § 6076 (Evid. Code § 451.) "Judicial notice of the matters specified in Section 451 is mandatory, whether or not the court is requested to notice them. Although the court errs if it fails to take judicial notice of the matters specified in this section, such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence is not reversible error) or that points not urged in the trial court many not be advanced on appeal. . . . Section 451 includes matters of both law and fact. The matters specified in subdivisions (a), (b), (c), and (d) are all matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The court can reasonably be expected to discover and apply this law even if the parties fail to provide the court with references to the pertinent cases, statutes, regulations and rules." (29B West's Ann. Cal. Evid. Code, *Comment--Assembly Committee on Judiciary*, (1966 ed) § 451, p. 325.) The reviewing court must judicially notice each matter the trial court was required to notice under Evid. Code § 451 (Evid. Code § 459.) The exclusionary rules of evidence do not apply (Evid. Code

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§ 454(2).)

An agreement was made to bifurcate the trial, ostensibly so the court could save time (C.T. 62-63: 19–4.) All evidence of the total amount of work done by each of the parties was barred from trial by stipulation, but evidence of the nature and

overall cost of the work was admissible (deposition of Charlotte Hamann (Vol III) 220-223: 1-15; R.T(A) 129-130: 20-14.) Barely one hour into trial and contrary to the stipulation, Threlkel's counsel asked his client:

> "Q. It's our understanding by stipulation that if the Court finds that we're going to get into the costs of labor we'll get into individual items, but just taking the broad brush approach how--what do you estimate to be the proportionate amount of work done by each of you up until the date you left the premises?
> [THRELKEL]: I believe I did approximately 60% of the work and Charlotte did about 40% of the work." (R.T.(A) 16: 20-27.)

Hamann's counsel failed to object to the question or to this version of the stipulation. He also failed to object to exactly the same question Threlkel's counsel later asked Hamann:

> "Q. What percentage of the overall labor would--you heard Mr. Threlkel testify that he thought he did 60% of the work on the property. What percentage do you think you did?
> A. I think in terms of real money, in terms of what it would cost to have somebody do the work, that it's better than 90 percent." (R.T.(A) 167: 4-10.)

Threlkel's counsel exploited this testimony in closing argument (R.T.(A) 209-210: 24-8.):

> "I think, and the Court has certain portions of the testimony which unfortunately are clearly opposed. I find it rather astounding that anyone would believe or claim that the work in this case was 90/10. Mr. Threlkel may be off a little at 60/40, maybe it's 50/50, maybe it's 55, maybe it's 60 the other way. But 90/10 suggests such unfairness that I would doubt that Ms. Hamann would have sat by for all these years and let that go if, in fact, she thought it was 90/10 because she was not hesitant when she went back and he's seek to get credit for the amount that is being spent on her rent payments back there, to have that added in, as you can see from the

agreement, which is Exhibit 3."

Hamann's counsel did not counter this misleading statement. He was still unilaterally holding up his end of a deal which had been breached within the first hour of trial; he had agreed to say *nothing about the total* amount of work done by each of the parties and so he didn't say a word.

Immediately following the trial court's decision on January 31, 1991, Hamann asked to make a statement. The court allowed her to make a statement but would not allow her to make it on the record. The judge's response off the record at this time convinced her he had bought

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Threlkel's claims regarding the amount of work he had done, he did not believe Hamann could prove she had done the work, and his belief regarding the labor was pivotal in his decision (R.T.(A) 249-250: 25-1; letter to the court from Hamann dated February 20, 1991, sealed envelope.) She returned to court one week later, on February 7, 1991, with witnesses who could contradict Threlkel's testimony. The court refused to allow them to testify, refused to include their written statements in the record (R.T.(A) 241-242: 16-15; R.T.(A) 258: 5-8) and said it was *unfair* for Hamann to prove she had done the work (R.T.(A) 244: 11-17.)

Two weeks later Hamann wrote a letter to the court (dated February 20, 1991, sealed envelope.) Included with the letter were six hand written or typewritten statements of seven neighbors who had witnessed the work on the house. The statements were obviously written without the aid of an attorney. The style and content of each letter is individual and unique but all are consistent. Hamann did by far the majority of the work:

"

2-5-91

Judge Flier:

I feel that my forty plus years in construction work, many of them spent a carpenter foreman I am qualified to comment on the Hamann Threlkel remodeling project.

Passing the job site daily both driving and afoot it was

second nature for me to observe the progress and to note who was at work as well as who was not. After the initial thrust i.e. the first few months of occupancy during which I saw Rick and Charlotte working together on the house, I saw Rick working less and less and Charlotte doing the majority of the work.

During the two year period that Charlotte was away at school it was my impression that very little was accomplished on the remodel. In short and to sum up, it is my opinion that Charlotte did much much more than Rick as well as the planning, and providing the expertise that makes their house so livable and attractive.

Yours Truly
Roy E. Parker . . . "

There are five more statements. This court is not being asked to make a determination of the truth of the neighbors' statements, only to consider their value as an offer of proof.

It is not material that the subject of these statements, the amount of work done by each of the litigants, is not relevant to the interpretation of the contract. "Evidence Code §210 also makes it clear that evidence that attacks or supports the credibility of witnesses or hearsay declarants is

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"relevant evidence." To be relevant to the credibility of witnesses or hearsay declarants, it is not required or necessary that the evidence have any relevancy with respect to disputed issues or contentions in a case." (1 Jefferson, Cal. Evidence Benchbook (2d ed 1982) § 19.2, p. 452.) See also Deering's Ann. Cal. Evid. Code, *Law Revision Commission Comment* (1986) § 210, p. 25. Although the appellant's attorney did not offer the statements as an outright challenge to credibility, Hamann did (letter to court, dated February 20, 1991.) The trial court should have made an inquiry even though she failed to provide the court "with references to the pertinent cases, statutes, regulations and rules." (29B West's Ann. Cal. Evid. Code, *Comment--Assembly Committee on Judiciary*, (1966 ed) § 451, p. 325.)

The neighbors' presence in court on February 7, 1991, and their statements are sufficient evidence to require an inquiry by the trial court:

> State Bar Rules of Prof. Conduct, rule 5-200(B): [In presenting a matter to a tribunal, a member:] "Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." See also Bus. and Prof. Code § 6068(d).
>
> State Bar Rules of Prof. Conduct, rule 5-200(E): [In presenting a matter to a tribunal, a member:] "Shall not assert personal knowledge of the facts at issue, except when testifying as a witness."
>
> Code of Judicial Conduct, canon 3B(3): "Judges should take or initiate appropriate disciplinary measures against a . . . lawyer for unprofessional conduct of which they may become aware." See also ABA Code of Judicial Conduct, canon 3D.

Threlkel's counsel were aware Hamann's neighbors were prepared to testify for her. All but one were listed as witnesses in Hamann's Issues Conference Statement (C.T. 55, filed July 24, 1990) and Hamann was asked many questions about their testimony during her deposition (deposition of Hamann (Vol III) 141-165: 9-10, dated July 27, 1990.) By comparison, Threlkel listed no witnesses who would testify to his labor (C.T. 63) and his counsel were very anxious to exclude Hamann's witnesses from trial (C.T. 62-63: 20-4.) During pre-trial discovery, Threlkel's counsel were given voluminous documentation of her labor (C.T. 179: 19–26; C.T. 195; deposition of Hamann (Vol II) 129: 2-15 and exhibits (Vol I & II) 7, 8, 10,11, 12, 16, 18, 19, 20, 22, 23, 24, 25, 26.) Most of Hamann's documentation is not part of the record on appeal (C.T. 179: 19–26; deposition of Hamann (Vol II) 123: 8-13.) Threlkel refused to produce photographs which would document Hamann's work (C.T. 178: 7-15; C.T. 192-193 and response, Exhibit 17; C.T. 199.) In other

words, there is sufficient evidence that Threlkel's experienced trial counsel knew his client was not telling the truth about the work.

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Other misleading statements made by Threlkel's counsel can be found in the record. For example, he said Hamann had a obtained a fair market value of the house from a realtor but chose not to use that value (R.T.(A) 207: 21-27.) In fact, Hamann was unable to obtain a fair market figure (or an estimate of value) for the property from any realtor and she testified to that effect (R.T.(A) 152-153: 10-17, R.T.(A) 154-155: 11-1, R.T.(A) 159-160: 26-4.)

Hamann's attorney had a responsibility to his client, and to the trial court, to object at the time the false and misleading statements were made. Hamann certainly objected to her attorney, but deferred to her counsel's experience and understanding of the law. When Hamann's counsel attempted to reopen the trial on February 7, 1991, he chose an indirect approach and offered the neighbors' statements and their testimony as proof of who had done the work, rather than an outright challenge to credibility. One can only speculate whether the outcome would have been different had he been more direct. The record shows a confusing oral statement of decision, making it difficult to figure out how to approach this. Hamann did what she could do: she made a statement off the record; she brought her neighbors to court; she wrote a letter to the court. She again voiced her concerns on May 3, 1991, in a declaration, when she returned to court to clarify the judgment, to obtain the judgment, and to get her name removed from the existing note on the house (C.T. 171-172: 21–4; C.T. 176: 18-23.)

Hamann tried very hard to make sure the trial court got the facts. She did not waive her right on appeal to object to the trial court's indifference to this issue, *nor can she waive that right*. Neither litigant, nor counsel, may waive the rights of the court: all perjury is fraud on the court.

The responsibility of the court to sustain the integrity and

honor of the court is addressed collaterally in Silberg v. Anderson (1990) 50 Cal.3d 205 [266 Cal.Rptr. 638.] A civil litigant cannot sue opposing counsel or litigant for artifice, chicanery, deception, deceit, dishonesty, duplicity, subterfuge, or misrepresentation—or any other unethical breaches or illegal offenses—when these are effected as communications related to a judicial proceeding. Instead, litigants are supposed to rely on "criminal prosecution for perjury (Pen. Code, § 118 et seq.) or subornation of perjury (Pen. Code, § 653f, subd. (a)); criminal prosecution under Business and Professions Code, section 6128; and State Bar disciplinary proceedings for violation of Business and Professions Code, section 6068, subdivision (d)." to deter the illegal actions of opposing counsel and other litigants (Id. at 219.) *Silberg v. Anderson* asserts this will encourage zealous advocacy and reduce the burden on California courts. This reasoning also presumes a zealous judiciary, a presumption which, thus far, is not supported by the evidence.

The reluctance of members of the bar to confront this in trial court suggests they know

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efforts to expose unethical conduct are poorly received and the laws on perjury and subornation of perjury are rarely enforced; the threat of disciplinary action or criminal charges is inadequate deterrent. Where's the follow through?

On page 23 of this brief, the manner in which the trial court came to erroneously conclude hours were the basis for calculating the labor is set forth. This is the result of zealous advocacy. The bifurcation stipulation was a result of zealous advocacy. When the attorney purposefully asked his client the question about the percentage of work he had done, he crossed the thin line between legitimate advocacy and deliberately false statements of fact. Moreover, it's reasonable to conclude he asked the question because he believed the answer would affect the outcome.

The rationale for *Silberg v. Anderson* is administration of

justice and the freedom of the courts. *Silberg v. Anderson* and Civ. Code § 47 also protect the right of the appellant to advocate the honor of the trial court. The appellant respectfully requests the court of appeal refer this matter to the appropriate investigative or disciplinary authority, irrespective of the outcome of this appeal.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

RICHARD S. THRELKEL,	)	CIVIL NO. AO 54468
	)	
Plaintiff, Cross-Defendant and Respondent,	)	
	)	Contra Costa County
	)	Superior Court
	)	No. C89-03498
vs.	)	
	)	
CHARLOTTE A. HAMANN, Defendant, Cross-Complainant and Appellant	)	

RESPONDENT'S BRIEF
- and -
CROSS-APPELLANT'S OPENING BRIEF

On Appeal from a Judgment of the Superior Court of California, County of Contra Costa
The Honorable Richard S. Flier, Judge

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

RICHARD S. THRELKEL Plaintiff, Cross-Defendant and Respondent, v. CHARLOTTE A. HAMANN Defendant, Cross-Complainant and Appellant	Civil No. AO 54468 Contra Costa County Superior Court No. C089 03498

APPELLANT'S REPLY BRIEF and CROSS-RESPONDENT'S BRIEF

**Appeal from the Judgment of the Superior Court of California,
County of Contra Costa
Honorable Richard S. Flier, Judge**

CHARLOTTE HAMANN
P.O. Box 1096
El Cerrito, CA 94530
In Propria Persona

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

RICHARD S. THRELKEL, Plaintiff, Cross-Defendant and Respondent/Cross-Appellant. vs. CHARLOTTE A. HAMANN, Defendant, Cross-Complainant and Appellant/Cross-Respondent.	CIVIL NO. AO 54468 Contra Costa County Superior Court No. C89-03498

CROSS-APPELLANT'S REPLY BRIEF

Cross-Appeal from a Judgment of the Superior Court of California, County of Contra Costa

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

RICHARD S. THRELKEL Plaintiff, Cross-Defendant and Respondent, v. CHARLOTTE A. HAMANN Defendant, Cross-Complainant and Appellant	Civil No. AO 54468 Contra Costa County Superior Court No. C089 03498

PETITION FOR REHEARING

Appeal from the Judgment of the Superior Court of California,
County of Contra Costa
Honorable Richard S. Flier, Judge

CHARLOTTE HAMANN
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In Propria Persona

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The evidence the court cites would refute an agreement for compensation for labor with real property ownership, but such an agreement is not before this court. Other evidence would refute an agreement for compensation for labor with direct cash payment, but such an agreement is not before this court. The agreement before this court is an agreement to compensate for labor with equal labor: this is the equal labor agreement. The court has failed to look to the contract consideration to establish the terms of the contract. The court has failed to differentiate between the contract consideration and a request for damages.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

RICHARD S. THRELKEL,	)	CIVIL NO: AO 54468
	)	
Plaintiff, Cross-Defendant	)	
and Respondent,	)	Contra Costa County
	)	Superior Court
	)	No. C89-03498
vs	)	
	)	
CHARLOTTE A. HAMANN,	)	
	)	
Defendant, Cross-Complainant	)	
and Appellant.	)	
	)	

ANSWER TO PETITION FOR REHEARING

On Appeal from a Judgment of the Superior Court of California, County of Contra Costa

The Honorable Richard S. Flier, Judge

GUIDOTTI and LEE
Attorneys for Respondent

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

RICHARD S. THRELKEL Plaintiff, Cross-Defendant and Respondent, v. CHARLOTTE A. HAMANN Defendant, Cross-Complainant and Petitioner	**CASE NO. S031574** First District Court of Appeal, Division One Civil No. AO 54468 Contra Costa County Superior Court No. C089 03498 (Honorable Richard S. Flier)

PETITION FOR REVIEW

CHARLOTTE HAMANN
P.O. Box 1096
El Cerrito, CA 94530
In Propria Persona

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RICHARD S. THRELKEL,	)	CASE NO: SO 31574
	)	
Plaintiff, Cross-Defendant	)	
and Respondent,	)	First District Court
	)	of Appeal, Division
	)	One
vs.	)	Civil No. AO 54468
	)	
CHARLOTTE A. HAMANN,	)	Contra Costa County
	)	Superior Court
Defendant, Cross-Complainant	)	No. C89-03498
and Petitioner	)	
	)	

ANSWER TO PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court of the
State of California, Contra Costa County
Honorable Richard S. Flier, Judge

GUIDOTTI and LEE
Attorneys for Respondent

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LEGISLATIVE HISTORY OF CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 632

CURRENT LAW (1993)
Source Deering's Ann. Cal. Code of Civ. Proc. (1973) § 632 with 1993 Pocket Supplement

§ 632. Statement of decision

In superior, municipal, and justice courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which party is requesting a statement of decision. After a party has requested such a statement, any party may make proposals as to the content of the statement of decision.

The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties.

Amended Stats 1975 ch 301 § 2, Stats 1977 ch 1257 § 22, effective October 3, 1977, Stats 1981 ch 900 § 1. Amended Stats 1987 ch 207 §1

Enacted in 1872

Amendments:

1873-74 Amendment: Prior to 1873-74 the section read:

"Upon trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within twenty days after the cause is submitted for decision, and unless the decision is filed within that time the action must again be tried."

1873-74 Amendment (1) substituted "thirty" for "twenty"; and (2) omitted "and unless the decision is filed within that time the action must again be tried" at the end of the section.

1933 Amendment: Amended the section to read: "1. In superior courts and municipal courts, upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. In giving the decision, the facts found and the conclusions of law must be separately stated. In all cases written findings of fact and conclusions of law shall be deemed waived by a party by failure to appear at the trial. In municipal courts written findings of fact and conclusions of law shall be deemed waived unless they shall be expressly requested by one or more of the parties at the time of the trial; provided, that the court shall not be required to make any written findings of fact and conclusions of law in cases in which the amount of the demand, exclusive of interest and costs, or the value of the property in controversy, does not exceed three hundred dollars. In superior courts, written findings of fact and conclusions of law may be waived by consent in writing filed with the clerk or justice, or by oral consent in open court, entered in the minutes.

"Judgment upon the decision must be entered accordingly.

2. In justices' courts when the trial is by the court, judgment must be entered as provided in section 664 of this code."

1951 Amendment: Substituted (1) "judge" for "justice" in the last sentence of the first paragraph; and (2) "In justice courts" for "In justices' courts" at the beginning of the second paragraph.

1959 Amendment: Added the second sentence of subd 1 to read: "In giving the decision, the facts found and the conclusions of law must be separately stated."

1968 Amendment: Amended the section to read: "1. In superior courts and municipal courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required, except as herein provided.

"In superior courts, upon such a trial, the court shall announce its intended decision. Within the time after such announcement permitted by rules of the Judicial Council, any party appearing at the trial may request findings. Unless findings are requested, the court shall not be required to make written findings and conclusions.

"In municipal courts, findings and conclusions shall be deemed waived unless expressly requested by one or more of the parties at the time of the trial; provided, that the court shall not be required to make any written findings and conclusions in any case in which the amount of the demand, exclusive of interest and costs, or the value of the property in controversy, does not exceed five hundred dollars ($500).

"In any such trial in the superior or municipal court, findings and conclusions may be waived by consent in writing filed with the clerk or judge, or by oral consent in open court, entered into the minutes, and shall be deemed waived by a party by failure to appear at the trial.

"Where findings are required, they shall fairly disclose the court's determination of all issues of fact in the case.

"The procedure for requesting, preparing, and filing written findings and conclusions and written judgment of the court shall be in accordance with the rules adopted by the Judicial Council. Judgment shall be entered as provided in Section 664.

"2. In justice courts, upon trial by the court, no written findings of fact and conclusions shall be required in any case, and judgment shall be entered as provided in Section 664."

1969 Amendment: Substituted "one thousand dollars

($1,000)" for "five hundred dollars ($500)" at the end of the third paragraph in subd 1.

1975 Amendment: Added the sixth paragraph to read: "Where findings are required and a finding is supported primarily by evidence obtained at ta view as provided in Section 651, the court shall so state in its findings and shall also state its observations at the view supporting such finding. The statements required by this paragraph are not required to be stated in the findings where the court includes such statements in its announcement of intended decision."

1977 Amendment: (1) Amended the first paragraph by (a) deleting "(1)" before "In"; and (b) substituting "superior, municipal, and justice" for "superior courts and municipal"; (2) added "and justice" in the third paragraph; (3) substituted "superior, municipal, or justice: for "superior or municipal" in the fourth paragraph; (4) substituted "courts" for "court" in the first sentence of the seventh paragraph; and (5) deleted former subd (2) which read: "(2) In justice courts, upon trial by the court, no written findings of fact and conclusions shall be required in any case, and judgment shall be entered as provided in Section 664."

1981 Amendment: Amended the section to read as at present, except for the 1987 amendment.

1987 Amendment: Substituted (1) the second and third sentences of the first paragraph for the former second sentence which read: "Upon the request of any party appearing at the trial, made within 10 days after the court announces a tentative decision, or if the trial has lasted less than one day, made prior to submission of the matter for decision, the court shall issue a statement of decision explaining the factual and legal basis for its basis for its decision as to each of the principal controverted issues at trial."; and (2) "is concluded within one calendar day or in less than 8 hours over more-than" for "has been completed within" in the second paragraph.

CALIFORNIA STATUTES OF 1977, CH. 1257

632: In superior, municipal, and justice courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required, except as herein provided.

In superior courts, upon such trial, the court shall announce its intended decision. Within the time after such announcement permitted by rules of the Judicial Council, any party appearing at the trial may request findings. Unless findings are requested, the court shall not be required to make written findings and conclusions.

In municipal and justice courts, findings and conclusions shall be deemed waived unless expressly requested by one or more of the parties at the time of the trial; provided, that the court shall not be required to make any written findings and conclusions in any case in which the amount of the demand, exclusive of interest and costs, or the value of the property in controversy, does not exceed one thousand dollars ($1,000).

In any such trial in the superior, municipal, or justice court, findings and conclusions may be waived by consent in writing filed with the clerk or judge, or by oral consent in open court, entered in the minutes, and shall be deemed waived by a party by failure to appear at the trial.

Where findings are required, they shall fairly disclose the court's determination of all issues of facts in the case.

Where findings are required and a finding is supported primarily by evidence obtained at a view as provided in Section 651, the court shall so state in its findings and shall also state its observations at the view supporting such finding. The statements required by this paragraph are not required to be stated in the findings where the court includes such statements in its announcement of intended decision.

The procedure for requesting, preparing, and filing written findings and conclusions and the written judgment of the courts shall be in accordance with rules adopted by the Judicial Council. Judgment shall be entered as provided in Section 664.

CALIFORNIA LEGISLATURE—1981-82 REGULAR SESSION

ASSEMBLY BILL No. 1684

Introduced by Assemblyman Harris

March 26, 1981

An act to amend Sections 632 and 670 of, and to repeal Section 634 of, the Code of Civil Procedure, relating to courts.

LEGISLATIVE COUNSEL'S DIGEST

AB 1684, as introduced, Harris. Courts: findings and conclusions.

Existing law requires superior, municipal, and justice courts, upon the trial of a question of fact by the court, to issue written findings of fact and conclusions of law if requested by a party, with certain exceptions, and sets forth rules of law regarding the legal effect of the findings and conclusions.

This bill would eliminate the requirement for such findings of fact and conclusions of law and would provide, in lieu thereof, that upon request of any party to the action, made at or before submission of the matter for decision, such a court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial. The bill would specify that the statement is to be written unless there is a verbatim record of the proceedings, in which case the statement may be made orally on the record.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 632 of the Code of Civil Procedure is amended to read:

632. In superior, municipal, and justice courts, upon

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AMENDED IN SENATE AUGUST 27, 1981

CALIFORNIA LEGISLATURE—1981–82 REGULAR SESSION

ASSEMBLY BILL No. 1684

Introduced by Assemblyman Harris

March 26, 1981

An act to amend Sections 632 ~~and 670 of, and to repeal Section 634 of,~~ , *634, 635, 662, 663, 670, and 909 of* the Code of Civil Procedure, relating to courts.

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Assembly Bill No. 1684

CHAPTER 900

An act to amend Sections 632, 634, 635, 662, 663, 670, and 909 of the Code of Civil Procedure, relating to courts.

[Approved by Governor September 27, 1981. Filed with Secretary of State September 28, 1981.]

LEGISLATIVE COUNSEL'S DIGEST

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Existing law requires superior, municipal, and justice courts, upon the trial of a question of fact by the court, to issue written findings of fact and conclusions of law if requested by a party, with certain exceptions, and sets forth rules of law regarding the legal effect of the findings and conclusions.

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The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial has been completed within one day, the statement of decision may be made

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orally on the record in the presence of the parties.

SEC. 2. Section 634 of the Code of Civil Procedure is amended to read:

634. When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue.

SEC. 3. Section 635 of the Code of Civil Procedure is amended to read:

635. In all cases where the decision of the court has been entered in its minutes, and when the judge who heard or tried the case is unavailable, the formal judgment or order conforming to the minutes may be signed by the presiding judge of the court.

SEC. 4. Section 662 of the Code of Civil Procedure is amended to read:

662. In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before a decision had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659.

SEC. 5. Section 663 of the Code of Civil Procedure is amended to read:

663. A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment:

1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.

2. A judgment or decree not consistent with or not supported by the special verdict.

SEC. 6. Section 670 of the Code of Civil Procedure is amended to read:

670. In superior, municipal, and justice courts the following papers, without being attached together, shall constitute the

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judgment roll:

(a) In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint; the request for entry of default with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; if defendant has appeared by demurrer, and the demurrer has been overruled, then notice of the overruling thereof served on defendant's attorney, together with proof of the service; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons.

(b) In all other cases, the pleadings, all orders striking out any pleading in whole or in part, a copy of the verdict of the jury, the statement of decision of the court, or finding of the referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him or her by default, the summons, with proof of its service, on the defendant, and if the service on the defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons.

SEC. 7. Section 909 of the Code of Civil Procedure is amended to read:

909. In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues.

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